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STANDING COMMITTEE ON THE OMBUDSMAN

EXPANSION OF OMBUDSMAN'S JURISDICTION

THURSDAY, AUGUST 18, 1988

Morning Sitting



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Elliot, R. Walter (Halton North L)
Bossy, Maurice L. (Chatham-Kent L)
Bryden, Marion (Beaches-Woodbine NDP)
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MacDonald, Keith (Prince Edward-Lennox L)
Mackenzie, Bob (Hamilton East NDP)
McLean, Allan K. (Simcoe East PC)
Pollock, Jim (Hastings-Peterborough PC)

Substitutions:

Campbell, Sterling (Sudbury L) for Mr. Lupusella
Harris, Michael D. (Nipissing PC) for Mr. McLean
Reville, David (Riverdale NDP) for Mr. Mackenzie
Tatham, Charlie (Oxford L) for Mr. MacDonald

Clerk: Carrozza, Franco

Staff:

Wilson, Jennifer, Research Officer, Legislative Research Service

Witnesses:

Individual Presentations:

Evans, John

Munroe, Gary D.

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Thursday, August 18, 1988

The committee met at 10:09 a.m. in committee room 1.

EXPANSION OF OMBUDSMAN'S JURISDICTION
(continued)

Madam Chairman: I will call this meeting to order, now.

Today, we are dealing with expanded jurisdiction and, as you are aware, we are dealing with only three issues of expanded jurisdiction for the Ombudsman, children's aid societies, public hospitals and the Ontario new home warranty program. We have invited comments from the public and for people to come before us and give their views on the possibility of expanded jurisdiction of the Ombudsman into any one of these three areas.

Today we have John Evans before us, who will be making a presentation. We ask that you try to keep your presentation to perhaps 10 or 15 minutes so that there is an opportunity for the committee members to ask some questions. If you have any material you would like to leave with us afterwards, we would certainly be willing to keep it so that in our deliberations we have something. If not, then we have a record on Hansard of what you have said so that in a month or two we can refresh our memories if there was a specific point that was important.

We would appreciate it if you would begin any time.

JOHN EVANS

Mr. Evans: I would just like to say on the children's aid society, I feel that if anybody has a legitimate complaint against any children's aid society, which in London is called family and children's services, after they have dealt with the normal procedure for in dealing with complaints, if the individual is still not satisfied, I feel personally that the Ombudsman should intervene.

I know of a particular situation, because of the way the law is, where the children's aid never had power to keep an eye on that family situation. The consequences of the whole thing were that the two little girls, both under the age of two years old, were physically beaten by the father. They were taken to hospital and X-rays were taken to make sure no bones were broken. They were taken into custody. If the children's aid society had been able to keep an eye on the family, maybe this would not have happened.

I know of other situations where children have been sexually abused and the children's aid society has told me that it cannot step in because there is no evidence. Other people who are aware of this refuse to get involved. The episode where the two children are under the care of the CAS now, I tried to the best of my ability to lay my concerns before the worker involved and they were ignored.

The mother of the two children, as far as I am concerned, needs a lot of counselling and guidance. In my mind, the children are going to be harmed

psychologically because the father was in jail for a very serious offence, but it is a proven fact that sexually abused children or physically or mentally abused children grow up and do the same thing to their children. This is what happened to this fellow and I believe, because of the marriage problems they had, he just came to a point where he blew up and beat those two little kids up.

I am involved now with a person who is very close to me. She is before the court now to get her two kids back. She refuses to do anything for herself to get her kids back. Consequently, I am going to back off and let her do whatever she has to do. I have a funny feeling that the courts will let her have her children back. She is involved in a very abusive relationship and I do not personally feel that the children's aid society will keep the kids while she is in this abusive relationship.

One little girl was indecently assaulted by the father. He has visiting rights but under supervision. She is four years old. She is very frightened of the father; she is very frightened of other men; and she is very frightened when she is around people who are intoxicated. The mother of that little girl, as I said, refuses to do anything to better herself.

The other thing I would like to talk about is the Ontario hospitals. They have patient advocates at the London Psychiatric Hospital now, but when a patient is released or is on a leave of absence in the community, there is no support system for that individual in the community. There has been some talk by a legal clinic in London to see if it is possible to start an advocacy program for patients in the community, to give them support, because when you are released from a psychiatric hospital, you are not an outpatient.

A lot of people look down upon you because you have been in a psychiatric hospital. They sort of stand away from you. I do not think that is right. I think they are human beings and they need a lot of support to stay out of those places.

That is all I would like to say.

Mr. Pollock: I take it that you were pretty close to this couple who had all the problems?

Mr. Evans: Yes, they lived with me for a year and a half.

Mr. Pollock: They were in the same house?

Mr. Evans: Yes.

Mr. Pollock: You went to the children's aid society and complained about this?

Mr. Evans: In January or February of last year. When the couple was living with me, I learned that the girl was sexually assaulted by her stepfather. I finally persuaded her and her boyfriend at that time to go to a family consultant at the city police in London, which they did.

It is my understanding from the superintendent of detectives there that she signed a form, a piece of paper, for the police in Ontario to read, because she did not want her younger sister to be put in the care of the children's aid and pushed from foster home to foster home as she was.

When I went back to London in 1986, in January or February, I went to the police again and laid my concerns before them. They told me that because there was no solid evidence, they could not do anything. So I wrote a letter to two detectives who look after that kind of thing and they gave me some information. They told me that they went to speak to the couple and the couple refused to talk to them, so the police left and turned it over to the children's aid. That is not true. I found out that is not true.

They suggested I call the children's aid, which I did. I spoke to a children's aid worker and that children's aid worker was supposed to come to this couple's apartment at one o'clock that afternoon. I was there from 12:30 p.m. to four o'clock. He did not show up.

That is what I am saying. If he could have been there and observed the situation, and under law been able to keep an eye on that family, maybe those kids would not have been beaten and maybe they would not be under the care of the children's aid today.

Mr. Pollock: It is pretty hard for social workers, though. You are saying that for a time period from 12:30 p.m. until four o'clock you were there, but it is pretty hard for the children's aid society to have 24-hour vigilance on any one couple.

Mr. Evans: This is true.

Mr. Pollock: I agree with you in the fact that when the case worker for the children's aid society said he would come, he should have come, right enough; there is no question about that. These situations do exist out there and they should be investigated; there is no question about that.

Madam Chairman: Any further questions from the committee?

Thank you. You are the first person we have heard from on the children's aid society, and it will be helpful when we decide about the Ombudsman and whether he can be a helpful force in the deliberations over the children's aid society. We appreciate your coming before us today. Thank you very much.

Our next individual does not come until 11 o'clock, and so may I suggest that we recess until 11 o'clock or a few minutes before, just in case he arrives early, and then we can commence immediately? How about reconvening about 10:55 a.m? Good.

The committee recessed at 10:21 a.m.

1117

Madam Chairman: We can call the meeting back to order. We have before us Mr. Gary Munroe.

Mr. Munroe: Just plain Gary; no "Mr." on me, please.

Madam Chairman: Gary Munroe has come forth today to make a presentation on the expanded jurisdiction of the Ombudsman hearings. We have until 12 noon, so you can judge the time you need to make your presentation. Please keep in mind that the committee may want to ask some questions.

Mr. Munroe: I have 40 minutes?

Madam Chairman: That is right.

Mr. Munroe: The Ombudsman had eight hours.

Interjection: There you go.

Mr. Munroe: It is not fair. I have 40 hours of tape about the Ombudsman, child and family services, Ontario hospitals, public health department and all that kind of stuff. Cutting me down to that many minutes—

Madam Chairman: Normally, what people who come before us do is make a presentation summarizing their points of view. If you want to leave any documentation whatsoever with our clerk, he will duplicate it and we will all have access to it.

Mr. Munroe: I will leave all these tapes with you, as long as I get them back. There are a lot of tapes there.

Madam Chairman: We will make copies and make sure that you get them back immediately so that we can, in fact, get your full presentation, leaving an opportunity for the committee to ask questions.

GARY MUNROE

Mr. Munroe: OK. I will start reading some of the papers I have.

In 1974, I lost my child, Donna Lee Munroe. I went to the Conservative Party of Ontario for help, to David Peterson for help, to the Ombudsman's office for help, and to all of the people who are supposed to help people. Now, from all of these people I went to, no help.

I had Judge Genest, and I was told not to do anything about my case in Toronto. He sent my child to a training school. In the training school, she was kicked in the leg by a man. I am not allowed to do to children what they are allowed to do to children.

Here is a progress report written by them. "Donna had many problems when she first arrived from Oakville"—in Oakville, she tried to kill herself; I was not told about that—as she had problems relating with any adult and had few close friends in her peer group." It does not say she had 15 social workers too.

"Donna ran from the school on two occasions." Being like me, a fighter, I expect my child is a fighter too. They did not understand that. "Donna was unable to communicate her feelings and appeared as a very lonesome, quiet girl. This attitude gradually changed as she learned to accept staff." They were giving her pills to keep her quiet. That is why she became easier to understand. To stop those pills, I had to go to somebody in Toronto.

1120

Why does the system allow kids to be treated like that? When she was in training school, they had girls putting pencils up girls' bodies. To throw a man into a holding cell, you have to have a lawyer there. Where you have to have a lawyer for adults, they can throw children into these areas with nobody asking any questions. Why is this allowed to happen with children?

People say the child and family services department helps children. One

child and family services worker was sent up north; one went to Nova Scotia. He said every time Donna Lee turned her head sideways, she would be in court. She had her home changed seven times in 30 months. A girl of 14 found out in court where she was going next.

Imagine having to have a child change homes seven times. One was a home behind a place where beer was. Another home was up in the attic. They went out and left two kids in a house by themselves, locked in a room. I cannot do that. So she kicked the door down to get out. She was charged for that. Can I charge my child for kicking down the door? No, I would not do that, but why do we allow that to happen? It does not make sense to me.

David Peterson did not help me. Premier Davis did not help me. You did not help me. How many people here are Conservatives? The Conservative Party did not help me. The New Democratic Party did not help me. The Liberal Party did not help me. The federal Liberals did not help me. The only one who helped me so far was Jim Jepson. Why did only one person want to help me?

I have been asked to leave Canada by Charlie Turner. I have been put in jail twice over this. Why is this happening? If you have any questions, ask them, because I do not have too much time. I do not want it to be like what you did to some people. You had them in here talking, let them talk and said, "Well, he had his say."

All right. Here is a document that reads, "Provincial court, county of Middlesex, Donna Lee." What was she charged with there? It does not say here. Every time she broke down a door, she was taken to court. For all that happened to that child, I will never, for the rest of my life, speak to my grandchildren, my kids. The rest of my life, never again will I speak to them because nobody helped me with Donna Lee. Nobody. Not one little person.

Even the Ombudsman's office says, "Oh, they have all these people in that office." Not one of them helped that child. If they helped that child, that child would not have spent three years in jail. I cannot lock a person up in a house. Out west, a person tried to take a person off the street; the police took the person out. I am not allowed to lock a person up for three years, but the system is.

When they were finished with her, they put her up north. Since they did that, I will never speak to them for the rest of my life. I was in the hospital two years for a heart condition. She came in the room. I told her: "Get out of here. I don't want to see you any more." When I make my mind up, I do it, because too many people in the system do not help people. You are better off to tell lies than to tell the truth.

A couple of years ago, I was told I had polychlorinated biphenyls in my body, and then the stupid, damned heart attack. Nobody helped me there either. Why is this allowed to happen? We have people trained in university. Is anybody trained to help people? Is there? You have been in the system a long time. You are from up north. Are they helping people up north? They talk a lot in the federal government. Is anybody allowed to help people where you live? I cannot get any answers out of you; God bless you. It is my fault.

All right. On the letterhead of the Minister of Community and Social Services: "Your letter to the Honourable Keith Morton has been delivered. On his behalf, I want you to accept the assurance that Donna Lee's circumstances will be investigated. I have asked the appropriate officials in the ministry to undertake a review of the situation and make a report to the minister." No answer.

The Office of the Ombudsman knows about that. They got no answer from the minister. Were you not minister at one of the offices? Environment? No. You were not allowed.

This letter was written: "Having known Gary Munroe and Barbara Storms for some time now, I am quite sure it was the CMHC decision...that caused the breakup of the marriage." Family and children's services said to this person, "Why did you write that letter?" Are they allowed to be in my bedroom? They can tell your common-law wife to leave you? The Office of the Ombudsman is telling her to leave me too. Can the board of control members tell her to leave me too? Have I got a bad disease in me that means they can tell people to leave me? No answers.

Here is a letter from the Office of the Ombudsman: "You could contact the minister, the Honourable Keith Norton, and explain your situation to him. The minister would, in turn, request information from the training school and community programs in which Donna Lee has been involved to ascertain the appropriateness—a big friggin' word there—"of your request. You must remember that the staff in the training school system carefully consider the needs of the child." If they care about the child, why are they not in the washrooms when these girls are putting things up girls' bodies?

I made a tape of Donna Lee in the training school. The Ontario Provincial Police in that town took that girl out of that place. When the girls are busy, somebody is coming to visit the place. When they are doing nothing, they just sit around. This proves I have been an Ombudsman case. It is not my fault they can tell lies to us.

This is a letter from the Ministry of Community and Social Services: "This is to advise you that Donna Lee went absent without leave from the school on April 11. Your daughter was apprehended and returned on the same day." They always wanted to tell me bad news but never told me any happy news. I will never speak to my kids or grandchildren for the rest of my life, because nobody had guts enough to help. I do not know why they were like that.

Worst of all, I had to go to court to get my child from the children's aid society. The workers were the same as my wife had. How can they have the same worker as my wife had? How can they do that when I do not live with that person? That is playing the game two ways. It does not make sense.

They told me she was just like me, and they told her I did not love her. They told the child I did not love her. Why are they allowed to tell children their parents do not love them? I loved her so much and fought so hard for her. I got no help. I will never speak to her for the rest of my life.

1130

I went to mother's allowance to keep her in job as a dishwasher. She went there instead of being a dishwasher.

Interjection.

Mr. Munroe: They are telling me I have only a few minutes. It does not make sense to me. If you do not want to ask questions, I am just wasting my time coming to Toronto.

Here is another letter from the Ombudsman's office. This was 1976. That would be Arthur Maloney.

Do not whisper. We are not in Russia yet.

Madam Chairman: I was just checking with someone, because I did not think the Ombudsman started until later.

Mr. Munroe: Is somebody from the Ombudsman's office here? Yes? God bless you. Do not tell any more lies that you help children, because you do not. On this tape it says that the Ombudsman told my common-law wife to leave me. This tape was made when I was talking to the family and children's services office—another one that is supposed to help kids. They told me I could not use that tape to talk. I was the only one there and I wanted to make sure I knew what I was saying. That tape was made when I was talking to them.

Here is a good one. "I wish to acknowledge your letter of December 9, 1976, to myself and Mr. J. K. Macdonald, director of the child welfare branch." This is supposed to be a guy who protects children. "Concerning the issues raised in your letter of complaint, there is no magic solution." How can he say "a magic solution" to fight a bureaucratic system? If I did that at work, I would be fired. That was Stephen Charko—I do not know if he is still here or not—supervisor of field services, child welfare branch.

I went to Grete Grant of the London Legal Clinic to bring a lawyer from Toronto who fought for children. She refused to bring him down for Donna Lee as her lawyer. At that time, we had no lawyers who fought the system in court.

Here is one from Mrs. Peach, BA, Dip SW, personal services. She has enough letters after her name. She must be a smart person, I guess. "In response to your request for another worker, sent to Mr. Charko of the Ministry of Community and Social Services, I would like to let you know that Mr. Ian Gamble has agreed to act as your social worker." He was no help.

In those copies there, when I got this piece of paper, they were all blacked out. Why are they allowed to black out stuff so I cannot read it when it is about my family? They called the child a Protestant. The child is Catholic. It makes no sense to me.

In London, Ontario, we have the only place where they keep children in a jail that has a fence. The fence is about 20 feet high. Where is that place built? Next to a big hydro line. Is that a good place to have that? No, it is not. They tell us there is something off the wires that can do something to them. It was the only place in Ontario that has a fence around. The first place where they keep kids. The second place is up in Goderich. The rest have open places.

I have talked in London, Ontario to the human rights office, the labour people, the health people, city council, board of control, the Ombudsman's office in London. They tell me I have to write it down on paper. I have trouble now writing stuff down on paper; I cannot write any more. Sometimes when I talk to you, I have to think about what you are saying because I cannot remember what you said.

They told me I have to write a letter. I do not have anybody come knocking at my door saying, "We are here to help you." Only two people did that, and I give them credit. That was because of Jim Jepson, the only one.

For me to find out that she was missing up north, I had to call and say I was an Ontario Provincial Police officer, because I called before and they would not say anything. But I had this feeling that she was missing, so I

phoned up the day after and said: "I am an OPP officer. Where is Donna Lee?" She said, "She is missing." So I had the OPP phone me and say, "You should not do that." I got the answer I expected I was going to get by saying I was an OPP officer, but as a father, they would not tell me. When I said I was an OPP officer, they told me.

All the trouble started over this: "In connection with your visit to this office, please be advised we have had an opportunity to examine the listings taken by Mr. Cudmore of Max Leisinger Real Estate Ltd. and Trudy Rochefort of Carrothers Real Estate Ltd.

"The listings, first one signed by Ted Hopman, the previous owner and the second by the Rudyks, set out "new roof two years."

"In a discussion with Mrs. Rochefort, she stated that she had no knowledge as to the age of the roof, but merely accepted the information on the previous listing, and claims the matter was not discussed with the Rudyks.

"For your information, Mr. Cudmore is now deceased. Also, I believe Mr. Hopman lives in Toronto"—this guy lives in Toronto now—"and the Rudyks in Orangeville.

"It does not appear this ministry can assist you further in this matter. If deliberate misrepresentation is to be claimed against the Rudyks and their agent..."

They said the roof was only two years old and the roof was over 10 years old. That is how the trouble got started.

The labour office in London says it has no papers on me. How can they say they have no papers on me, and I have all these papers? I had no protection from them with the system.

1140

Here is the Ministry of Correctional Services probation and after care branch. Report: "Donna Lee Munroe appeared before His Honour Judge M. H. Genest in family and juvenile court in London on July 19, 1976 on three charges of theft under \$200, contrary to section 294 of the Criminal Code. One charge was dismissed as no evidence was offered and she entered a plea of guilty to two charges..."

They had these lawyers who wait around family court. They meet the person for one hour. That should not be allowed. They should have lawyers who know the person, talk to them like they talk to adults and wait around because the lawyers would say, "You have to go in and learn something." Well, they are learning something off people who do not get help.

Red Brennan, James Leonard Brennan beat her with a belt. They put her in that house. That person was not taken to court over that either.

"Father, Mr. Gary Munroe, age 37, is currently employed in anti-pollution control by the city of London.

"On interview, Mr. Munroe presents as a man who is very militant in defence of his rights,"—what does that word "militant" mean? I should know that word—"both as a human being and as a citizen of a democratic society. He sees attempts by social agencies as problem solving involvement within his

family as a breach of privacy..."

I would have had these kids of mine in Nova Scotia myself until the system had a meeting at the Ontario hospital. Dr. Dymond was there. The public health department was there. The family and children's services were there. I could not find out anything without that meeting but I have on tape the people who were there. How can they have these meetings and not tell the person what was said? The woman from the public health department moved back to some place else.

"On interview, she presents as calm..."—this is my ex-wife—"with the welfare of her children very much on her mind.... London Psychiatric Hospital however, advises that she was a patient there for a period of 18 months terminating in 1958 before her marriage, for another period from February 1972 until October 1972 and from September 1973 until January 1974.

She was in the hospital more times than that but they only put down a few days. They brought a piece of paper to me from one doctor. I said I could not accept it. They would have to get another one because they had more paper than I have that just—

If they had left me alone, I would have had the three kids in Nova Scotia. I would not be sitting here today telling you about this problem. But now if a child goes missing, the radio stations still do not know about it. The police know about it. They told me at this place where she had Donna Lee that the police were not involved in it. They did not tell the police.

I found out the police went into my apartment when I was at work. So how can they tell me the police are not involved when I hear reports on my police radio every night about what kids are missing. But they never go on the radio and say kids are missing because it would make the system look bad. They take kids and they go missing. They end up down in Toronto selling their bodies. It does not make sense to me.

They were using a tape recorder on me when I was trying to talk to her. Why is that legal? If you are going to use a tape recorder, tell me and I will say a lot more. The day we were in court one time, they would not even let the child go to court that day. They allowed Barb Storms to throw gravy and try to hit her with a hammer. Nothing was done about that.

Dr. Eberhard checked her bottom out James Leonard Brennan (inaudible) for belts and it was marked by him. He sent his paper to the two of them who are supposed to protect children, but nothing was done. I cannot talk any more. There is no sense talking. I will give you all these tapes. Not those ones. They are the copies, those ones. There are 21 tapes. I want them all back and a copy of what each one says. On that tape you will be hearing the Ombudsman's office telling me not to tape when I was talking to him. That proves I went to him for help.

Where do you suggest a person go to get help in Canada? When I was told I had polychlorinated biphenyls, they told me I had a sugar diabetes test. To have a sugar diabetes test, you have to take sugar. That test with PCBs is a simple 65 parts per million. My finger shows PCBs. Nobody helped me.

Two years after that I had a heart condition. Nobody helped me. They were forced to give me pills then. This will take only 10 minutes. They told me I did not work with any PCBs. I have papers here that marked down all PCB levels coming in the sewage plants. They told me not to talk about my heart

condition. Why can they tell you that? That was at the Workers' Compensation Board office. They know who brought me there.

All right, here is me talking to the doctor. "Well, it was 65 parts per million." That is talking to the people who told me it was 65.

1150

All right, here is me talking to the London city police department:

"Because you said you even had—"

"All I know, Gary, is nobody gave any order like that. If you just had minded your own business, why nothing would have happened, I am sure. But you made the move and the result is they stopped you."

"All I wanted to do is talk to the man. Well, I made a move but I did not even"—whoever they are saying, the guys on the tape will tell you what that (inaudible) said—"How in hell would anybody tell somebody else he did not see him if it is not in your eyes. Channel 10 said I did not see him."

"Well, you were watching. You must have seen him because you made him move over to your door when you tried to get around close to your door."

What is this policeman's name? He is a grey-haired policeman. "Well, they jumped on top of me."

"Well, the problem, Gary—"

"What is the problem? You have been putting me down in this damned city so much, it is not funny."

"Well, it is your doing, not ours."

"Well, then how about somebody starting protecting my constitution, because if I am not allowed to talk to people, people are putting me down."

"Well, you can't just—you just can't—you know your personal— Gary, you just can't go and start talking to him and that was your intention. You can't do that."

"So it means if you walk into an MP's office, they said I've got to call the police before I can talk to you?"

"No, I don't think so. You should go through the secretary and if the MPs want to talk to you, it will talk to you."

"Then he would not allow me to talk to Prime Minister Trudeau. This is supposed to be a freedom of democratic land."

"Yeah, but it does not mean that— You know you are free, sure. That does not mean you are (inaudible) at first because you want to talk to them all (inaudible) sort of things."

"Yeah, because it is OK. Thanks a lot."

That is me trying to talk to Trudeau and that was the police saying I cannot talk to these people. I thought we had a democratic land, that we were

allowed to talk. If you cannot talk to them, why bring them to our cities? I like talking to the highest person I can find. The highest one I can find I will talk to, because it is a lot easier to come down than go up.

The Ministry of Labour said there were no polychlorinated biphenyls coming in, but there are papers there saying there are PCBs. Here are three more tapes. So you owe me \$44, \$48. You said you would pay my way down here.

Madam Chairman: We will make sure that all your expenses are reimbursed today. We appreciate you coming before the committee and we will ensure that you are returned all the documentation that you have given to us today.

Mr. Munroe: I think if you checked it out you have 90 per cent of these papers, unless they did what Trudeau and his gang did, tore up my papers when they lost the election.

Madam Chairman: We will endeavour to get these back as quickly as possible and we will send them by courier to ensure they are not lost on the way.

Mr. Munroe: So I gave you 24 tapes.

Madam Chairman: That is correct. The clerk will ensure that nothing happens to them.

Mr. Munroe: On today, I was at the meeting down in Toronto. I gave them 24 tapes. What is the date today, October something?

Clerk of the Committee: August 18.

Mr. Munroe: August 18. Thank you.

Madam Chairman: Thank you very much for coming before us today.

Mr. Munroe: Why do you say that? I know I can go out of here and not remember even talking to you.

Madam Chairman: Thank you, committee. We will reconvene at 2 p.m.

The committee recessed at 11:55 a.m.

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STANDING COMMITTEE ON THE OMBUDSMAN
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Afternoon Sitting



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Reville, David (Riverdale NDP) for Mr. Mackenzie
Tatham, Charlie (Oxford L) for Mr. MacDonald

Clerk: Carrozza, Franco

Staff:

Wilson, Jennifer, Research Officer, Legislative Research Service
Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon

Witnesses:

From the Office of the Ombudsman:

Meslin, Eleanor, Executive Director
Zacks, Michael, General Counsel
Morrison, Gail, Director, Investigations

AFTERNOON SITTING

The committee resumed at 2:09 p.m. in committee room 1.

Madam Chairman: Charlie's here. We can start. We could call our afternoon session to order. Any objections, Mr. Pollock? No, you were just going to make a point. Any comments from the committee before we begin?

Mr. Pollock: I just want to clarify the record, put it on record. When Mr. Munroe was here and asked this morning if there were any Conservatives here, I did not catch what he said right at the start. Mr. Harris raised his hand and then I realized what he said. I do not think raising your hand would show on Hansard so I want it on the record that there were two Conservatives here, Mr. Harris and myself.

Madam Chairman: I see. For your knowledge, I do not think Mr. Harris's hand was going to be on the record.

Mr. Reville: Mr. Pollock, do you think we should perhaps forward your constituency office number to Mr. Munroe?

Mr. Pollock: I do not think that is necessary. Let them deal with the chairman of the committee here.

Madam Chairman: We will certainly ensure that the record noted two representatives of the Progressive Conservative Party in attendance and that both of you had admitted but not verbally.

Mr. Reville: May I ask if the hearings were advertised in the press?

Madam Chairman: Yes, they were. Indeed, the two individuals we had this morning were respondents to the advertisement. We also sent out some 500 letters to groups and organizations which were considered to be groups that might be affected by expanded jurisdiction into those three areas and we had some response from that as well.

Mr. Reville: I just wonder whether it might be useful to do this in future on invitation.

Madam Chairman: By invitation only?

Mr. Reville: I am not sure how useful the interventions were to the deputants either. Given, they wanted to share with us a story they had experienced. It was not necessarily on point. I do not know. I felt a certain sense of discomfort as I listened to them this morning that perhaps they were misapprehending the nature of these hearings.

Mr. Chairman: We tried to clarify for them what the hearings were about and they assured us that not only did they understand it but they still did want the opportunity to appear before us.

Mr. Reville: Fair enough. Well, we should always allow people an opportunity to come forward.

Madam Chairman: This is the chairman's feeling. Anything further before we commence?

Mr. Henderson: I just want to echo that. I know of one or two people who want to come before the committee and at least in my judgement the committee would find it useful to hear from them. Although I kind of share the spirit of the question Mr. Reville raises and I know where he comes from, I think that the greater evil would be in not allowing people to indicate that they really have something they want to say. I think we are making the right decision if I understand your direction on that.

Madam Chairman: I think what might be beneficial at the end of this is to make a list of the individuals who came forward in response to the ad only and those that responded to the direct invitation by us to appear before the committee and perhaps we can evaluate how worth while the ad was. Then, when the standing committee on the Legislative Assembly or the Board of Internal Economy, or whichever group looks at this, looks at advertising for these types of hearings they can focus in on what it is that would be a more beneficial way of advertising. We will certainly keep track of that because it is interesting to see the variety of groups we do have before it.

No further comments, questions? Then we will have the Ombudsman's office. I believe we were in the midst of the public hospitals when we adjourned on Monday and we still have to deal in total with the Ontario New Home Warranty Program. Perhaps we can let the office do an outline first of your position and where you see the expanded jurisdiction going. Then I am sure we all have questions which have come as a result of this week's briefing. We will be jumping right in there to find out your replies to those.

Mrs. Meslin: Madam Chairman, I just want to begin by offering the Ombudsman's apologies for not being here. He has been present during the briefings and would have been today, but he had another pressing matter and he wanted to extend apologies to the committee for not being here.

Michael Zacks, our general counsel, will continue with the briefings. Then, of course, we will do an overall budgetary outlook for you before we are finished and have questions any time as the committee sees fit.

Mr. Zacks: I was planning to start with the Ontario New Home Warranty Program and just go through the statistics we have created to give you an idea of the impact expanded jurisdiction would have on the Office of the Ombudsman; also, to deal with a few of the issues which were raised when staff members of the Ministry of Consumer and Commercial Relations were here.

When they were here the other day, they had mentioned that there were two other home warranty program systems in the world like the one in Ontario. They were, I believe, in New Jersey and New South Wales. There is no Ombudsman in New Jersey but there is one in New South Wales, and we contacted our counterpart. He has invited the entire committee, at his expense, to come.

Mrs. Meslin: Careful, Michael, you are on the record.

Mr. Zacks: Well, actually, he just invited me.

They have, clearly, jurisdiction over that organization in New South Wales. It is called the Building Services Corp. They do investigations and get a number of complaints on a regular basis each year. I simply raise that to indicate that at least in New South Wales there is Ombudsman jurisdiction in this area.

Statistically, what we have done is used a number of contacts or claims

which were made on the program by members of the public, and our information is that it is 3,480 public complaints or claims. I should not call them complaints; I believe the program calls them conciliations.

In order to come up with a complaint impact on our office, we used, again, two different figures to give you a sense of the potential range of complaints. As I indicated the other day, two per cent of the psychiatric patient population in provincial government operated hospitals complain to the Ombudsman. We used that percentage and applied it to the home warranty program, and that produces 70 gross complaints. I also indicated that 0.22 per cent of the Ontario population complains to the Ombudsman on all matters over which we have jurisdiction. That would produce eight complaints to the Ombudsman and most likely it would probably fall somewhere in between.

In terms of jurisdictional complaints, we use two different figures, again, to show the range. The most recent figures for jurisdictional complaints from provincially operated psychiatric hospitals is that 34 per cent of the complaints made to the Ombudsman are within his jurisdiction. We applied that figure and get a range of jurisdictional complaints from 24 on the high end to 3 on the low. If you apply the overall jurisdictional ratio of all complaints to the Ombudsman, the figure is 21 per cent, which produces a range of between 15 and 2 complaints.

In our view, that would require no additional investigative staff to handle that workload.

Mr. Reville: Did you say no additional—

Mr. Zacks: None. We would be able to handle that additional workload with current complement.

I will stop there for any questions about the estimates I have just given.

Mr. Tatham: In New South Wales, how many houses broke down there?

Mr. Zacks: I do not know.

Mr. Tatham: What is the population there?

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Mr. Zacks: I do not know that either. I would say it is less than Ontario. The Ontario population is over nine million. I would say it is much less than that.

Mr. Reville: Roofs leak at different times of year there too, you know.

Mr. Zacks: But the point I wanted to make was that it is a jurisdictional matter in New South Wales.

Mr. Carrothers: Do you have any information on how the New South Wales plan is set up? Is it the same kind of independent corporation arrangement that is in this province?

Mr. Zacks: I do not know if it is an independent corporation. The information that we got from our contact there was that it is a statutorily

established corporation. It may be more analogous to a corporation such as Ontario Hydro or a statutory body.

Mr. Carrothers: I guess what I am wondering is if it is a government agency or not in New South Wales.

Mr. Zacks: For their purposes, what I also do not know is how their jurisdiction is established, whether it is analogous to ours or by a schedule. My recollection is it is analogous to ours, so it may be set up somewhat differently in order for them to have jurisdiction.

Mr. Carrothers: OK. Thank you.

Mr. Zacks: But their Ombudsman will be at the conference in Canberra. You might pursue it there

Mr. Carrothers: I am not sure that chance will be available to all of us.

Mr. Zacks: There were a couple of other points that I wanted to touch on, unless there are any more questions about that.

Madam Chairman: Did you have a question, Mr. Campbell?

Mr. Campbell: No.

Madam Chairman: None.

Mr. Zacks: There was much discussion about the availability of an appeal to the Commercial Registration Appeal Tribunal, and I just want to clarify the fact that although the Ombudsman has jurisdiction over that tribunal and can investigate the decisions of that tribunal, there is very little room for recommendations because that tribunal does not have the authority to reconsider its decisions. There is an appeal from that tribunal to the Divisional Court within a number of days after the decision is made and, if the complainant who goes to the tribunal appeals, again, the Ombudsman would have no authority to investigate the court's decision.

The conciliation process that exists under the Ontario New Home Warranty Program in section 17 of the act was referred to in the Ombudsman's jurisdictional paper to this committee as being an area where there is no Ombudsman investigation through the Commercial Registration Appeal Tribunal, and I just want to advise the committee why that view was given.

A number of years ago, we investigated a complaint dealing with that issue and actually sent the complainant, who was dissatisfied with the conciliation decision, to the Commercial Registration Appeal Tribunal. That tribunal rejected jurisdiction and said it had no authority to deal with any appeals from the conciliation process. It offered the view that the conciliation process was a complete system under the legislation and the appropriate appeal from an unsatisfactory conciliation was through arbitration. That is why we have taken that position. The Commercial Registration Appeal Tribunal may have revised its view, but I am not aware of that fact. As far as we know, that tribunal's position still is that any conciliation decisions which are made by the program that are unsatisfactory to the complainant are not appealable to the tribunal; they must go through arbitration.

The other important point to note about matter at the Commercial Registration Appeal Tribunal is that, unlike the Ombudsman, the tribunal is limited to reviewing the legal relationship that has resulted between the owner and the program. Unlike the Ombudsman, it cannot look at broader issues of a policy, a procedure of the reasonableness or justness of regulations and practices.

The Ombudsman's scope—his perspective—is much broader, as you know, and jurisdiction over this program will allow us to investigate and recommend improvements, if required, to all aspects of the program as they impact on members of the public who are covered by that legislation.

If there are any questions about the home warranty program, I would be pleased to deal with them now.

Madam Chairman: Nobody?

Mr. Reville: You may find this a question outside your—I am not going to say "competence;" that would be disrespectful and I do not mean to be disrespectful. Do you want to offer an opinion on whether it would be appropriate for the Ombudsman to take jurisdiction in this manner or is that not something you want to speak to?

Mrs. Meslin: No, at the committee's request, we are supplying this information and the Ombudsman would have to speak to that directly.

Mr. Reville: Fair enough. It strikes me that one of the questions for the committee is to grapple with the question of the appropriateness of the Ombudsman's extension of jurisdiction into the area and I assume you will be grappling with that at some point but there may be some legal advice that could be given to the committee and perhaps Mr. Bell is the appropriate person to do that when the time comes.

Madam Chairman: I am having a little bit of difficulty, actually, with Mrs. Meslin's answer to that question. I guess my understanding was that the Ombudsman in his paper was making the suggestion that he had received requests in these three areas, perhaps for assistance, and had to turn them down because of lack of jurisdiction; furthermore, that he felt perhaps more of a role or more jurisdiction in these areas would be advantageous and that he would be willing to take on these additional responsibilities if it were found that his jurisdiction went into these three areas. Maybe I misinterpreted that, but I thought there was some willingness on behalf of the Ombudsman to take on at some stage some role or additional role than the jurisdiction he has at this point in these three areas.

Mrs. Meslin: I do not think I was saying the Ombudsman did not want this jurisdiction. My understanding of the process we went through was that in the Ombudsman requesting that the committee look into expanding his jurisdiction, the committee asked him, after they saw his paper, if he would redirect himself to those areas he thought the committee should look into. As far as requests about problems over which we have no jurisdiction, we could say the same about universities or municipalities, but when he had to look at it and say, "OK, narrow it down to a number," he did that. If the committee were to say to him, "Can you do this?" I think that is what we are doing today. We are saying that if the committee and the Legislature so decides, on the basis of our information and what they hear, to give it to the Ombudsman, he certainly would do it.

Madam Chairman: Any other questions from the committee?

Mr. Tatham: I think we want to do a good job for people but I sure do not want duplication. That is where I am coming from. If we can go right up the different steps and come to the top and find out it is not resolved, then is there any way the Ombudsman could go down to the bottom and start up again? You want to start right at the base: if a person has a complaint, you want to start there and try and resolve it. Is that it?

Mr. Zacks: The way our authority is now over these types of problems, we have no authority to investigate decisions made by the Ontario New Home Warranty Program. None. We have jurisdiction over a statutory tribunal called the Commercial Registration Appeal Tribunal, one of whose responsibilities is dealing with appeals in certain circumstances made under this legislation. We also have jurisdiction in a number of other situations.

The difficulty is that our power to make recommendations is limited in a number of significant ways with the tribunal. First, we can only look at what was properly before that tribunal within its legislative mandate, which are usually the legal issues based on the factual situation that come to the tribunal.

The Ombudsman may say that the tribunal made an appropriate decision because the legislation mandated that it had to make that decision, but then the Ombudsman cannot say that the legislation was unjust because the legislation was enacted and the regulations also were made by the program; or where policy decisions that the program may make result in a decision, the Ombudsman is prevented from criticizing those decisions. In fact, he cannot even look at them.

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The other difficulty is that even where the Ombudsman does criticize a decision made by the program after the tribunal has examined it, there is very little room for the Ombudsman to criticize that tribunal in terms of making useful, remedial recommendations, because the tribunal has no power to change its decision. This was an issue that was before this committee with the Criminal Injuries Compensation Board. We had to go through certain groups to get that board to change its decision, and the way it was done was by going through the Divisional Court.

Mr. Tatham: If every person who had a problem with a home went to the Ombudsman, we surely would have to have a lot more people, would we not?

Mr. Zacks: It is not every person who has a problem with a home. It is only those people who have certain kinds of problems, as specified by the legislation, that are made to the program within a specified time period and they are not satisfied.

As I said, the program itself only dealt with some 3,400 claims. I am advised that the enrolments, that is, new houses built in 1987, were over 73,000 new housing units that were constructed which would have to be approved by the program and that, of those 73,000, there were only 3,400 claims made on the program itself. Our estimation, based on our experience with other agencies, is that out of that 3,400 we would, at the highest, get approximately 70 gross complaints, which would include both jurisdictional and nonjurisdictional complaints; so we do not anticipate that it would be a major impact on our resources.

Madam Chairman: Can I just correct the record? I recollect that it was 34,000 complaints and not 3,400. I think Mr. Elliot agreed that out of the 504,000 there were 34,000.

Mr. Zacks: My recollection is that is over the number of years.

Madam Chairman: Yes, perhaps.

Mr. Zacks: That could be clarified when the program comes.

Madam Chairman: We can clarify the 3,400 number.

Mr. Carrothers: Mr. Zacks, given the way this plan is set up in that it is a company, albeit a nonprofit company operated, I guess, by the home builders' association, which then administers a warranty plan mandated by a piece of legislation—this was the discussion I had the other day—which is very akin to a mutual insurance company operating automobile insurance, again, a normally nonprofit organization, operating a mandated policy, I wonder how the Ombudsman is not feeling he should get involved, obviously, with the automobile claims. I wonder what the difference is here or why you would feel it would be a logical extension to the Ombudsman's jurisdiction to deal with it, given the way this is now structured, and this is leaving aside the question of whether there are problems with the plan. The issue is extending jurisdiction. Why would you feel it should be extended?

Mr. Zacks: We have no desires on the insurance industry, but the provincial public sector does get involved in certain insurance programs. For example, workers' compensation is a form of insurance and crop insurance is in the area where the government has input. We have jurisdiction over that. The motor vehicle accident claims fund is an aspect of motor vehicle insurance, and we have jurisdiction over that area as well. The issue really is one of government involvement and control and government function as opposed to what the actual process is, what the actual classification of what is going on is.

Mr. Carrothers: That is the issue I am getting at. In the case of the Workers' Compensation Board, it is a board appointed by the government. In essence, the plan, while funded by employers, is to some extent underwritten by the government. In the case of the other one you named, crop insurance, while moneys are collected, I still think the government is standing behind it in some way. Again, it is administered by the government and by regulation and the insurance terms are set; whereas the way this plan is set up, it is completely at arm's length except for the fact that the terms and conditions of the plan are set up by legislation, which is the identical circumstance to an automobile insurance policy.

My question is, given the absence really of government control over the way this is set up, how do you logically argue to extend your jurisdiction there but not do it for insurance?

Mr. Zacks: It seems to us that there is a greater degree of government involvement with this program than there appears to be in the insurance industry, whether it is life insurance, home insurance or car insurance.

Mr. Carrothers: I mean specifically automobile because in automobile policies the terms are mandated by law, unlike the other forms. This is why I am drawing the analogy. To me, it seems reasonably close. Again, we do not want to argue whether it should be. I think maybe there should be more

government involvement with the plan.

Mr. Zacks: You could take the analogy even further, I suppose. Since all business corporations are established under legislation, you could go that route too, but it seems to us that there is—

Mr. Carrothers: But you do not have jurisdictions over those.

Mr. Zacks: We do not have jurisdiction over this area either.

Mr. Carrothers: In extending it, how do you differentiate between the automobile situation and this one in terms of where you extend your jurisdiction to and where you do not? Given the mandate in your act to deal with decisions in governmental agencies, how does it extend? Where is the breakpoint, I guess is what I am coming at?

Mr. Zacks: Because there is an area of review by purely governmental tribunal and a reporting structure to the minister, there is clearly a government-established program that was not in existence before. It was mandated as a matter of government policy. I suppose automobile insurance was here before government policy mandated it, but we feel this is an area that may be at arm's length but we think they are short arms. It is an area I believe can be distinguished from the automobile insurance, which has numerous different companies involved in it.

Mr. Carrothers: You are making a distinction based on this history in that this plan was sort of conceived and created as compared to one out of the insurance where the government has stepped in, I guess, to determine that it needs to standardize some things by legislation.

Mr. Zacks: As I said, it is something that has been purely set up by government policy to satisfy a societal need for proper home construction. There is a fair degree of government input in it and there does not appear to be any mechanism, in our view, for government oversight in the actual mechanisms of the program, and we feel that may be an area you want to consider for Ombudsman's jurisdiction. It would be an add-on to our current jurisdictional mandate. It would not be part of it.

Mr. Carrothers: My difficulty is that I think many people feel the plan has problems and maybe it should be restructured, and he may be making a case to restructure the plan and make it a government agency where there is more governmental control. In my mind, people have private disputes and public disputes with the government and the Ombudsman sits in when they are dealing with government. To continue from one to the other is not exactly always clear and there is obviously a breakpoint. I am just trying to place it in my own mind. This particular structure causes me some difficulty.

Mr. Elliot: Are you completely finished with the presentation in all three of the areas?

Mr. Zacks: No. There is a lot more to come.

Mr. Elliot: You just want questions now on HUDAC?

Mr. Zacks: Yes. I am dealing now with the program. I am going to go into hospitals.

Mr. Elliot: I will wait a while then.

Mr. Zacks: With your permission, shall I continue?

Madam Chairman: No. Mr. Bell has some questions still on the Ontario new home warranty.

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Mr. Bell: The first one is general, but I think we need to clear it up. It is fair to say that the committee members believe the Ombudsman is seeking expanded jurisdiction in these three areas and thinks it is appropriate to do so. There is no debate on that, is there?

Mrs. Meslin: No. When you say "seeking," this Ombudsman has said, and I think in his remarks when he opened up the debate on expanded jurisdiction, if you look in Hansard, that he is asking the committee to look at the possibilities.

Mr. Bell: No. He is seeking expanded jurisdiction. I will read you page 4 from his paper: "This is my first request for a limited expansion of the Ombudsman's jurisdiction. I believe this request is warranted and will be seen as reasonable."

I have always proceeded on the basis that from the moment the paper was released, he went on record as saying: "I want it expanded. These are the three areas." Sure, he says, "Look at the areas of expansion." I think it is important because this committee is going to have, among other things, to report some rationale and reasons to the Legislature for whatever it does. The Ombudsman's position, hopefully, categorically is an appropriate part of that. Can we take it that—

Mrs. Meslin: As there appears, from my point of view, to be some confusion, I do not think I should continue to state what the Ombudsman's position is. I would prefer that he state it clearly so that I do not misinform the committee.

Mr. Bell: We have to get it clarified before Hansard closes down, whenever that is, because I think it is somewhat—

Mr. Tatham: Why are we here?

Madam Chairman: That is the point I think Mr. Bell is trying to make, Mr. Tatham.

Mr. Henderson: Can we not simply take it from his remarks as they are in Hansard and as he presented to us here? Do we need to belabour it further?

Mr. Bell: I think it is quite clearly stated. If there is any change in that position, I think Dr. Hill will certainly bring it to the committee's attention at the earliest possible moment. From Mrs. Meslin's answer, I took it that she was saying: "I am not speaking for myself. I am not speaking for the office. I will let the Ombudsman speak." But I did not think there was a debate on the act of seeking on his part the expanded jurisdiction.

Mr. Henderson: I do not think there is either. I have not heard her say there is a change in the Ombudsman's position. I would hate to get into too much discussion of something I do not think we really need to be too preoccupied with.

Mr. Bell: No, I agree.

On the new home warranty program, you heard the discussion with the representatives from the ministry earlier this week and the issue was raised for the degree of formality of the appeal before CRAT. Do you have experience you could share with the committee on the degree of formality, including the frequency with which complainants bring lawyers to the appeal?

Mr. Zacks: I have never been to a CRAT hearing, but from the complaints we have received, I think it depends a lot on who the parties are before CRAT. CRAT has a very broad jurisdiction. They deal with a lot of licensing and registration issues with business people who are registered under real estate, mortgage brokers and so forth. Normally, when it is a professional licensing issue, I would think the applicant, the person who is appealing a licence removal or suspension, will go with legal counsel.

My experience from complaints is that where it is an individual asking for something he has been denied, such as in the home warranty program situation or some other situation, I cannot think of any off the top of my head where an individual is claiming something from government or from the program, separate from a licensing situation. They would normally go without counsel. In fact, in the case I referred to, where the individual had come to the Ombudsman, we actually sent them to CRAT. They drove down from Thunder Bay, I believe it was, without counsel and attended on their own, and they were quite upset with the result.

Normally, individuals, private citizens who are not fighting for their licence will go without counsel as a general rule. Those who are fighting for their licence to carry on a profession will go with counsel. If they lose at CRAT, they will likely go further to the Divisional Court, but most individuals will not. That is a broad generalization. I cannot comment on the actual formality of the hearings.

Mr. Bell: Are you familiar with the recommendations made by the legislative review project on this particular act?

Mr. Zacks: No.

Mr. Bell: I had an opportunity to read it on Monday afternoon. Paraphrasing one of the recommendations of that project vis-à-vis this act is that there be an increased degree of accountability "in all areas of the program," I think the phrase was. Some speculation perhaps, but if that recommendation were carried forward and implemented by legislation, it is quite likely the Ombudsman's jurisdiction would expand to the degree that the ministry became more involved. Is that correct?

Mr. Zacks: It is possible. The Ombudsman's jurisdiction expands and contracts over the years depending on legislative change, establishment of new tribunals, divesting of old bodies. It is a continuing process; it does not remain static. If this program were changed somehow, if the structure were changed, the reporting mechanism altered, it might automatically come within our jurisdiction.

Mr. Bell: If, for example, there was an amendment to the act that required hereafter regulations be submitted to cabinet and that the regulations were enacted in the usual course through the cabinet's committee on regulations, etc., up through the ministry, that would give you some jurisdiction over the regulation process, would it not?

Mr. Zacks: Yes, it would, indirectly through the minister's approval process and recommendation process through cabinet. Again, it is a very indirect, derivative type of jurisdiction.

Mr. Bell: Is there anything else about the submissions made by the ministry representatives earlier this week that you would like to comment on?

Mr. Zacks: The only point I would like to add is that it seems to us, again going back to the appeal mechanism, CRAT, that the way it was explained, with the attendance of the program's counsel and the role of the tribunal deciding the issues before it in a quasi-judicial nature, it is a fairly adversarial process.

The Ombudsman's role, as it is currently, is a nonadversarial, conciliatory process. The Ombudsman remains impartial, and he does not take the side of either the complainant or the government until the matter reaches its finality and we come before you or we deem the complaint to be not supported. The complainant may interpret that as taking the government's side, but the entire investigative process of the Ombudsman, the way the Ombudsman approaches his function, is nonadversarial.

I think that is an important thing to keep in mind when dealing with all these three areas, because advocacy and adversarial relationships permeate them all. It is an important factor to realize that the Ombudsman is the antithesis of that process. He attempts to be nonadversarial in dealing with government, I think to the public's advantage.

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Mr. Bell: Except that subsection 15(4) may deprive you of the opportunity to become involved until that adversarial process is completed.

Mr. Zacks: That is right.

Mr. Bell: In a way, it really does not make any difference, does it?

Mr. Zacks: It makes the difference that when that process is completed and the complaint comes to the Ombudsman, he will take a fresh, nonadversarial approach to it and look at the entire spectrum of issues that are raised.

Mr. Bell: I understand that. How is any expanded jurisdiction over this act and the plan going to affect your ability to do something vis-à-vis an appeal that has been taken to the Commercial Registration Appeal Tribunal?

Mr. Zacks: When that appeal is concluded and an individual does not go to the Divisional Court—the vast majority of complaints that come to the Ombudsman have no court facet to them at all. Very few complainants who come to us have gone to court. They choose not to. They choose to come to the Ombudsman or they are unaware of their right to go to court.

The Ombudsman, if he were given expanded jurisdiction in this area, would be able to look not only at the tribunal's decision but at all aspects, practices and policies, at the implementation of statutes and the application of regulations taken or not taken by the program, and give his opinion on whether those are reasonable or just, on whether they are oppressive or improperly discriminatory, and be able to look not only at questions that directly reflect the individual but also at the overall administrative process

of the program and make observations and reach conclusions and recommendations dealing with maladministration for the benefit of all individuals who deal with the program.

Ms. Morrison: I would make an analogy to something we already do, our review of Social Assistance Review Board decisions. There, we have jurisdiction over the board, which is an appeal mechanism from the director's decision.

When we look at the decision at the Social Assistance Review Board level, we also investigate the director's decision; so we have the authority to make recommendations not only about the narrow range of issues which come before the board but also over the whole range of issues which sometimes determine the success or failure of that appeal by what the director did in the first place.

This is very much the same kind of thing. We would be looking at the decision in both of its incarnations: in its original form and what the Commercial Registration Appeal Tribunal did. That is a very much more thorough ability to review policies, procedures and decisions than just the appeal mechanism.

Mr. Zacks: We would be going behind a decision looking at those facts and processes that led to the decision. Why was this decision made in the first place? Can it be improved?

Mr. Bell: What is stopping you from doing that now?

Mr. Zacks: In relation to the program?

Mr. Bell: Yes.

Mr. Zacks: We cannot do it now because even though we can look at the program complaint at the tribunal and look at what the tribunal did and at the legislation that was before the tribunal, the regulations, which are really the substance of the program, are beyond our purview.

The practices of the tribunal that resulted in a decision, which govern how program officials interact with the public, are beyond our purview. We cannot look at what happened between a program staff person and a member of the public who approached the program for assistance. We cannot examine the program's forms. We cannot determine if the information is correct, sufficient and accurate. We cannot look at any of those issues at all.

Mr. Bell: To boil it down, is what you are saying that with the expanded jurisdiction, when it comes time to make a recommendation you are not confined to a recommendation directed solely at CRAT but can make a recommendation to the corporation?

Mr. Zacks: That is right; exactly.

Mr. Bell: That is to be contrasted with the one we have seen a few years ago where you were limited to the recommendations you made to the ministry and to CRAT. I am not even sure if you made one to CRAT.

Mr. Zacks: We did not make it to CRAT. The committee did.

Mr. Bell: All right. I think the committee understands that.

Mr. Elliot: I was going to wait until after the dissertation on the proposed hospital extension, but since this is really a supplementary to the line of questioning that has just been going on, I would like to make some observations and express something that is coming through as a concern to me because of the testimony we have heard over the last week or so.

We have had presented to us a number of different alternatives to satisfying the needs of the individual who is not being looked after in society. One of the things that is coming to the front of my mind is the relative cost of some of the procedures. Without saying so, some of the individuals say that the operation of your office would be horrendously expensive.

One thing I would like to put on the record with respect to discussions I had after testimony yesterday is the fact that in the situation in the Ministry of Health, for example, we found out that they are considering some sort of advocate in three different areas, and in doing a little bit of mathematical calculation there, the cost that I came up with was between \$10 million and \$20 million per year on a continuous basis if you really did the job the way it was spelled out in the testimony.

The question I put to the people when I had a chance was, "Are you conversant right now with the global budget for a year of the Office of the Ombudsman?" The answer was no. I think there was a relatively large amount of surprise in the individuals when they found out the total budget was \$7 million, in that order, as far as the estimates were concerned, as I recall them, and the total staff was in the order of 125. I think this has a lot to do with whether or not we suggest expanded jurisdiction in an area like we are talking about with the home ownership warranty program in particular.

In talking with my colleagues about this, the one thing we are quite concerned about is, when you get at it at the ministry level, when you do have jurisdiction, this inability to go back to square one and find out what really went on in the complaint and just being able to comment after the review process on whether or not it was handled correctly by the minister in my view often does not satisfy the needs of the person who is complaining, the individual.

I think it is particularly pertinent in the case of a new home. If there is a faulty beam and it is not replaced, it is a problem; if it goes through the process and for some reason, technical or otherwise, everything is reviewed properly and the beam is not replaced, the person has a faulty home in which to live. With an independent group like your own, with investigative ability to go in and find out that was the original complaint and because of not meeting a 15-day or 30-day deadline to file an appeal or something of that order, the person did not get satisfaction, I think that is dead wrong and it should be set right by whatever program is in place.

That is the kind of complaint in the unresolved ones we have been looking at where, because of some technicality or some other reason in the regulations as they stand and, in fact, in a couple of cases, the tribunal or whatever that made the final decision did not have any authority to make a judgement with respect to costs, and because of that judgement the costs could not be paid or, in fact, they told somebody to pay the costs and, because of the lack of regulations being in place in the ministry involved, they could not legally pay the cost, the individual did not get satisfaction although something clearly wrong had been perpetrated.

For the record in this context it is very meaningful that the kind of extended costs involved here are part of the record. I do not know whether your office had the intent of putting on the record later in your testimony the suggested costs, but if you had not planned to do that, I think it is really important to note the kind of thing that I already talked about, that the total cost of the office is \$7 million a year, and the increase is approximately \$1 million over that, which is approximately 14.6 per cent of the estimates we were given a while ago, and the relative amount of money there to get satisfaction might be a lot less than to get satisfaction in some of the other alternatives.

The patients' rights group, for example, wanted to put a commission in place that would handle all the tribunals and everything. No costs were associated with the proposal. That makes me feel a little bit leery because it could add up to be an awful lot of money. The idea of having an advocate in every hospital in the province to satisfy the needs of individual patient complaints, when you have more than 200 hospitals involved, could add up to a great big bill. The problem is that when you are talking about something like the Ministry of Health where you are already spending \$13 billion a year, the added cost, relatively speaking, might not be that significant. When we are putting together our recommendations down the road, I think these are the kinds of things we should really be highlighting.

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The reason I added this right at this point was that I think it really significant that, it seems to me, the stopper, the problem in all of this right now is that when you get at most of these things at ministry level, which you do have jurisdiction over, you cannot go back to square one and investigate the way you want to. If we can show, and if you can show, that the cost associated with that kind of opportunity for investigation is the best way of doing it from a financial and independence point of view, these are the kinds of things that I, as a committee member, would be very forceful about supporting, because in my role as an MPP out there, I know a lot of individual complaints are for various reasons not satisfied to the satisfaction of the complainants when there is just cause for them to be satisfied. That, to me, is the role of the Ombudsman's office.

I do not know whether you want to comment on my comments. The question I was going to ask before Mr. Bell highlighted the fact that this seemed to be the main lack in the whole thing was, do you think the Office of the Ombudsman would be the best and most efficient way of looking after this kind of concern from a financial point of view?

Mrs. Meslin: I think we were going to address the budget items a little later, but in answer to your question, we think so because when we talk about that increase, that is over and above the experienced people we have who would also be involved with these new areas if we got jurisdiction in them. After hearing a couple of the ministries talk about what they were looking to, I think overall our budgetary need would be far less than theirs and we would still be the independent agency in the end that, I think, could do it professionally.

Mr. Carrothers: Maybe my question has been answered, but I just want to get at it again. We chatted about the children's aid societies. I got an impression that while you got in at the end of some of the appeal processes, the problem was that you could not go back and look at what happened.

Mr. Zacks: That is right.

Mr. Carrothers: I can understand in that very subjective system you might want to do that. In this one, though, we have a mix of private and public players. Obviously, if you had some jurisdiction, it would only be over the plan; it would not be over the builders, who are the first line of players in this thing anyway.

Mr. Zacks: I should tell you that the builders, as well, would have the right to complain to us about their relationship with the program. It would not just be home owners. It would be anyone who has a complaint about the program.

Mr. Carrothers: A complaint about it; but in most cases, I think it is going to be people claiming money from the plan.

Mr. Zacks: I would think so.

Mr. Carrothers: Yes. When that reaches the appeal tribunal, facts are going to come out, I guess.

Mr. Zacks: Yes.

Mr. Carrothers: What we have here is usually a situation where you have a defined set of rules under which the plan pays out. You have a set of facts that presumably would be there, as to whether the leak was of this kind or that kind, when it came up and that kind of thing. I would have thought virtually everything in the file would be on the table at the appeal tribunal for you to look at. What extra could you get at? I can see it more clearly in the children's aid situation than I can here, getting back to the beginning of the process with that.

Mr. Zacks: Our experience is that usually there are a number of policies and practices that result in certain actions taking place in the way an agency deals with the public. That is something the Ombudsman always tries to examine: why the decision took place.

Mr. Carrothers: In the case of this, are they not reasonably public? My experience was they were.

Mr. Zacks: They are regulations.

Mr. Carrothers: But the plan's policies are also pretty public. I seem to remember having a book of them, anyway.

Mr. Zacks: You may have them, but I am just saying the tribunal would be limited, I think, to eliciting the evidence from the parties, making findings of fact and applying the law. The Ombudsman, although he would not necessarily be challenging those findings of fact that are made, or their credibility, does have the ability to examine the law and decide whether or not that law itself is reasonable. He also has the ability to look at practices and procedures to decide whether those procedures and decisions based on them are reasonable and to recommend changes. That would not be within the scope of the tribunal's authority. They would have to accept the regulations as they are given and apply those regulations.

Mr. Carrothers: Maybe I am misunderstanding where your jurisdiction ends then. Surely at the appeal tribunal, difficulties with the law would

become pretty clear and you could comment on that. In the case of basements, for example, they extended it to two years because they found the people buying mid-year were falling outside. That sort of thing must become pretty evident, even at the tribunal level.

Mr. Zacks: It may be, but we still have the authority to criticize these regulations, not at this time. The ministry was suggesting those would be changed in the future. The other thing—

Mr. Carrothers: Can you not comment on things that are kind of evident to the general public? Can you not bring that into your commentary—

Mr. Zacks: No.

Mr. Carrothers: —as a judicial notice, I think is the term? The Ombudsman cannot take Ombudsman's notice, if I can use that—

Mr. Zacks: We pride ourselves as being like Caesar's wife. We are not going to go outside of our jurisdiction.

Mr. Carrothers: But I am thinking of things that are so widely known that you will not even have to have evidence.

Mr. Zacks: Our legislation does not allow us to do that. If we feel we have to criticize somebody, we have a duty to give him notice and an opportunity to comment. We do not have any jurisdiction. It might be seen as inappropriate and the Ombudsman might be criticized for criticizing a private individual or investigating an individual's actions. At this point, we see the home warranty program as outside our jurisdiction, essentially, for purposes of our legislation; it is no different than two neighbours fighting over a property line.

Mr. Carrothers: You will still have that problem here. My experience with the plan has been that many of the problems are the actual builder's practices, which you are not going to be able to comment on from what you are saying anyway.

Mr. Zacks: No. We would not be able to do that.

Mr. Carrothers: You would be commenting on whether the plan should be stepping in to back up the builder or to pay out when the builder has not finished what he is supposed to have been told to do. Most complaints I have seen, though, are about the builders themselves.

Mr. Zacks: The other thing that I think it is important to know about the Ombudsman is that he has the ability to say, "Even though you have done something right and the law is fine 99 per cent of the time, in this particular case something has happened that is not really just," and try to make some kind of combination, or see if there is some kind of remedy to help this particular individual who sort of falls between the boards. That is something that cannot really be done by the tribunal, and that is what an ombudsman does on a regular basis.

Mr. Carrothers: Even if that becomes evident at the tribunal, you cannot comment on it, you feel right now.

Mr. Zacks: The tribunal could not do anything about it. It would be limited to—

Mr. Carrothers: Your review of the facts will not show it.

Mr. Zacks: No. We could not criticize the tribunal for applying the law.

Mr. Carrothers: But you could comment on the result of the tribunal applying the law, could you not?

Mr. Zacks: We could say the tribunal—

Mr. Carrothers: You are not criticizing the tribunal but saying the law appears to result in an injustice.

Mr. Zacks: An ombudsman could, but it would be inappropriate for us to do it; it is outside our legislation.

Mr. Carrothers: It appears that there was some previous report on HUDAC from this committee. Is that right?

Mr. Zacks: There was a complaint against an investigation of the tribunal, a decision on a HUDAC action. We focused solely on the tribunal, and HUDAC got brought into it through the reference of the ministry—

Mr. Carrothers: Excuse me. It is the home warranty plan rather than HUDAC.

Mr. Zacks: Right.

Mr. Carrothers: Thank you.

Mr. Reville: I want to refer back to a set of statements made by Mr. Elliot and some dialogue you had in respect of his interest in advocacy in general and what I thought I heard you say might be the relative cost of having the Ombudsman's office provide advocacy and having others provide advocacy.

Mr. Zacks: It was not I who had the conversation with Mr. Elliot.

Mr. Reville: Who was it? Where was I? Was I in the wrong room or something?

Mr. Zacks: Oh, you are talking about the cost of advocacy.

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Mr. Reville: Yes. What I thought I understood the salient point of the conversation to be was that with the addition of \$1 million to your budget, you thought you would be able to provide the advocacy services that the Ministry of Health guessed were \$10 million to \$20 million. Have I come in on the wrong note here?

Mrs. Meslin: That is not what I said. We in no way would provide advocacy service at all. The Ombudsman's job is not to be an advocate, and Michael mentioned that earlier on. I think the point that Mr. Elliot was making was that the ministry, in talking about introducing an advocacy service, talked about the funding and the amount of money that it might take. All that we are saying is, whether there is an advocate program or not, the Ombudsman, if he had jurisdiction in hospitals, would be able to handle the

complaints on the budget that we are talking about, the budget that we have put forward. We are not duplicating an advocacy position at all.

Mr. Reville: Nor suggesting that you would be providing one.

Mrs. Meslin: Definitely not.

Mr. Reville: I guess that is what caused me the concern. I thought Mr. Elliot was saying that your office could in fact provide an advocacy service that would be an alternative to some kind of advocacy service that currently does not exist, about which there will be much debate, I assume, because there are a number of views about how to go about that.

Mr. Beatty and others who will have been before you have developed quite a body of opinion on how to do that, and there has been a great deal of government consultation about advocacy in general. We are all hoping that one of these days soon, we will see the fruits of the government's labours. In fact, if we do not soon see them, if you read the papers, you will be reading of our despair at that in the papers.

I hope that my intervention is not totally useless. It has helped me to understand what you are talking about, I think, but perhaps not.

Mr. Elliot: I am glad you talked about this to clarify the situation, because it is really important that we understand the context that I am putting this in. My objection to the type of argument against the extension that the Ministry of Health was putting forward, based on the fact that, because the advocates were going to be there, the extension of the Ombudsman's jurisdiction is not necessary, is not necessarily valid.

I think down the road what we will be seeing is a number of these initiatives working in tandem to the advantage of the person who has the complaint. My main concern is that those people who have valid complaints that are not being satisfied now get those complaints satisfied, and the context I was trying to build there was that we should be doing it in a financially responsible way. Down the road we could very easily need advocates as well as the intervention of the Ombudsman's office, but I do not think we should not extend the jurisdiction necessarily because the advocate is there. That is the main thing. We could need both services, really, for the individual.

Mr. Reville: Begging the pardon of the chair, I know that Mr. Elliot and I are having a little conversation here. That is not exactly correct procedurally, but if I can just continue this briefly and get a piece of information from you as well—for instance, can you investigate a complaint in respect of the activities of the psychiatric patient advocate office?

Mr. Zacks: Yes.

Mr. Reville: That is the answer I was looking for, that there is a system of advocacy that does both legal and therapeutic advocacy, which you would not want to take on, clearly; but you will look at the way they go about their business and investigate a complaint in that regard.

Mr. Zacks: If someone complains about it.

Mr. Reville: Have you?

Mr. Zacks: We have had a few complaints, not very many.

Mr. Reville: Thank you.

Madam Chairman: I thought that was very fruitful.

Mr. Reville: You are so kind, but I knew that you were kind people.

Mr. Campbell: I wanted to look at the statements made by Mr. Zacks that we would represent builders too. The mind conjures up all kinds of things where this committee would be hearing Cadillac Fairview coming in to deal with a problem that it may or may not have. I choose that developer advisedly, not because of any record of problems with that builder. In fact, it has been pointed out in this committee that they probably do a very fine job of redress.

But it brings to mind a problem I am having with this whole area in the fact that here you have a builder or builders who would be coming to this committee and saying that the tenants or the owners who have taken over these properties are all bad actors and the law has to be changed or the policy has to be changed or whatever it is. That is what I get nervous about, in that I understand the Ombudsman to be on the side of the individual person who has no real legal recourse or no recourse at all, no protection, and it is the job of the Ombudsman to investigate what happens.

I guess that one statement says to me that, with the protection of the tribunal, the individual is not represented by counsel in your estimation, Mr. Zacks, but the builder would be represented by some form of legal counsel, given that his licence may be involved as well. We heard the other day, of course, that a builder could be downsized if in fact he was shown to be a bad actor, and his licence therefore could be in jeopardy in the form of being reduced in being able to develop certain properties. That is why I am bringing it in that way, the builder coming to this committee and saying, "The government is wrong in saying that I can only build five houses at a time instead of a 50-house subdivision which I have money for."

Mr. Zacks: It is a possibility that we could get a complaint like that in our jurisdiction.

Mr. Campbell: Is that really not the role of the Ombudsman? If you have all kinds of legal recourse to go to court and do all of these things, you are really saying that you will in fact be expanding into a judicial body.

Mr. Zacks: For 12 years we have been investigating complaints made by employers against workers' compensation decisions. The majority are employee complaints, but we do not discriminate. I am not suggesting that is where your question is coming from, but the Ombudsman has a history of investigating complaints from both sides of the issue.

We have complainants who are health professionals who are dissatisfied with the Health Disciplines Board decision and have come to us, workers' compensation situations. We have had municipalities come and complain to us about government decisions. If we have jurisdiction over the new home warranty program and a builder complains to us, whether or not he has gone to the tribunal, in certain circumstances we might have jurisdiction over that complaint.

They are two different processes. A builder's grievance or complaint about a program decision affecting his licence could be handled in a separate stream from a home owner's complaint about denial of compensation. My understanding is that the builder is not, as a matter of right, a party before

the tribunal on that type of complaint. So the majority of complaints we expect would be home owner complaints and the builder would not be involved.

That is not to say, if we have jurisdiction over the program, we would not get builders' complaints. We likely would. There is a very broad range of builders in Ontario from very large to very small builders, who may equally be little people in their own right in the building industry, as compared to some large operations. There is no means test or any type of discriminatory practice where we decide whom we can investigate and whom we cannot. We have been doing that since the office was established.

Mr. Campbell: No, and I would never suggest that was the case, because I know you only investigate certain groups. But what I am having difficulty with is my traditional understanding of the Ombudsman's role and dealing in this one instance—and the other instances as well I am sure you will speak to it in time—but after hearing the kinds of things you propose to be getting into, given representations we have heard from delegations this week and last, and given what you have said, I am very much concerned that the role of expanded jurisdiction in this manner gets more into a quasi-judicial system of a tribunal upon a tribunal almost. That is the way I see it, using this committee as the court of last resort or as a supreme court, in a sense.

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Mr. Zacks: That is what this committee has been doing for about 12 years.

Mr. Campbell: Except that up to that point you have had people in who were looking at a Workers' Compensation Board situation which perhaps precludes the kind of legal counsel, although MPPs and others represent—

Mr. Zacks: No. You have assessed (inaudible) what this committee has seen. We have investigated complaints about Ontario Highway Transport Board decisions from transport companies.

Mrs. Meslin: The Ontario Labour Relations Board.

Mr. Zacks: Union complaints, employer complaints, restaurant owner complaints involving liquor licences.

Mrs. Meslin: Land owner complaints.

Mr. Zacks: Land owner complaints. Whatever the government gets its fingers into we investigate, regardless of who is affected. They come to us.

Mr. Campbell: Then why are you after expanded jurisdiction in this form if you already have it? That is the other thing that bothers me.

Mr. Zacks: We do not have it over this area. We do not have it here.

Mr. Campbell: But you do after the tribunal has dealt with it. That is what I am having difficulty understanding.

Mr. Zacks: I am obviously failing here. Let me try—

Mr. Campbell: No, no. Correct me if I am wrong. You seem to be saying to this committee that either you want to get in earlier on the investigation, in which case I have some difficulties because I think the

tribunal has a certain role, or you want to get in after the fact with more information.

Mr. Zacks: Let me draw an analogy to the workers' compensation situation.

Mr. Campbell: I was afraid you were going to do that.

Mr. Zacks: All right. I will pick something else.

Mr. Campbell: No, no.

Mr. Zacks: Let's take an example of a Social Assistance Review Board decision where we get a complaint about a board decision concerning a procedure which the director of income maintenance has carried out. The way the medical advisory board that decides medical issues conducts its procedures is that we get the complaint after the review board has dealt with it and has dismissed the appeal. We look at the review board's decision and see that the review board has properly dealt with the matter. We then also, simultaneously, look at the director's procedures, how he manages his operation and how that medical advisory board which decides the medical issues operates.

We cannot look at that income maintenance question until the SARB has finalized its review. Once it has done that, we look at the SARB decision and then we look at the director's decision. We see that SARB has acted properly but the director has done something improper; we feel the practice and how they are running this particular area is unreasonable. We recommend change.

We recommend that the director change the actual decision because even though SARB was required to find the way it did, the whole process was tainted at the initial step. SARB could not do anything about it, but the decision gets changed. The applicant gets the compensation. All other applicants who are similarly situated get dealt with in an appropriate fashion. Everybody is satisfied, we hope.

That is what I am trying to explain here. With the work of the Commercial Registration Appeal Tribunal, we are even more narrowly restricted because we cannot look behind those tribunal decisions. We can in some situations. We can where the initial decision complained about to the tribunal is generated by the Ministry of Consumer and Commercial Relations, as it often is, by their registrars who supervise various areas of commercial practice. We cannot in this area because we do not have the authority to do so.

That is what we are saying. We are limited. We cannot give the same service to the complainant who comes to us—you can have two people going to CRAT about different issues. You can have someone going to CRAT about a real estate problem, and we can look at that CRAT decision and look at a registrar of real estate brokers and see how he has conducted himself, but we cannot look at the program.

We cannot give the same level of service to both individuals who are before the same tribunal; because one decision is generated by a government official, we can, whereas with another which is generated by a nongovernment official, we cannot. That is the difficulty we see.

Mr. Campbell: Let me follow your analogy, if I might, a little further. The SARB case is a case, let's say, in a general welfare assistance instance, in which the director made a decision and the person is denied: end

of case. You have recommended, say, that it should be looked into that people under 18 in certain situations receive social assistance under the general welfare provisions. But with a builder, basically, as I understand it, people are coming because they are not satisfied that the roof was fixed or the basement was cracked. Are you going to be recommending different types of construction material for that community? I do not understand where you would be able to make the rule different, unless you are talking about changing building codes and things like that.

Mr. Zacks: We can recommend changes to the building code if we get a complaint like that; we never have. The provincially generated building code would be within our jurisdiction.

Mr. Campbell: Well, then, I do not understand even more. That seems more to make my case. I do not understand the kind of decision you would be making similar to the one you have given to me as a result of a SARB case. You are saying to a government official at a municipal level, perhaps, that he made an inappropriate decision and the policy is wrong or whatever. But in a builder's case, if the roof leaks, the roof leaks.

Ms. Morrison: Suppose the policy of the home warranty program were that when they were going to investigate whether the roof leaked, they sent the builder and had him give them a report about whether the roof leaked. The complainant came to us and said, "They're not going to fix my roof because the builder says there's no problem with my roof, and of course the builder says there's no problem with my roof because he built it." It seems like a crazy procedure they might have, but they might have such a procedure in place.

We would then be able to look at how they got their information and whether their policy in obtaining information was an appropriate one and say to them: "Look, you can't get information by going and asking the builder who made the mistake to tell you whether he has made a mistake. You have to get an independent builder to go and look and see if the roof leaks." That may be a completely fictitious policy.

Mr. Zacks: Or, "Use your own inspectors." For example, inspectors do paper reviews instead of actual physical site inspections. That could be what generated this complaint to the tribunal, and the tribunal would look at the information and say, "Sorry, we can't help you." We would go back to the program and say: "In certain situations you must do on-site inspections. You can't do paper reviews." We cannot do that now.

Ms. Morrison: Whereas if we could only look at the tribunal's decision, we would look at the evidence before the tribunal and say the tribunal only had this evidence to make its decision on, and we could not find the tribunal to have been unreasonable in its decision because the information upon which it acted was the appropriate information which the law required it to consider. We could not get back to the policy of the home warranty people of giving the tribunal the wrong information altogether.

Mr. Zacks: Another possibility would be that we might get complaints—all this is, of course, hypothetical. We do not know how they run their procedures. When they get an original complaint about a claim for compensation, for instance, how do they actually go about deciding the merits of that complaint? Is there an internal hearing? Is there simply a paper review? Is there an administrative fairness process? Does the owner get a chance to state his case in person or in writing? Can he bring in witnesses? Can he bring in his own builder to give an opinion? Must he use the

information obtained from the actual vendor who sold him the property? Those are types of internal procedures we would be looking at.

Mr. Campbell: OK. Are you saying, then, in some sort of isolation you are looking at expanded jurisdiction to this area, not knowing precisely what the practices are?

Mr. Zacks: We know there are complaints.

Mr. Campbell: How are you making the decision? Because you know you have complaints.

Mr. Zacks: We have had complaints in the past where the home warranty program, we felt, was wrong through the way it was treating an individual. We were prevented from criticizing the program.

Ms. Morrison: And investigating.

Mr. Zacks: Or investigating it. We could not investigate it at all. We were limited to the very narrow area of the tribunal decision and we were forced to look at that. We could not go back into how the program dealt with the individual and try to correct it at the source, albeit after the tribunal result—if, in fact, the individual went to the tribunal at all. A number of people do not do that for a number of reasons: the expense, cost and ability. They just do not take their statutory remedies. This is not unusual to this tribunal. It happens in all areas. They can come to the Ombudsman and we can deal with that type of problem at the source, and we do that on a daily basis.

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Mr. Pollock: Supplementary along that same line: I understand that all you can do now is a paper review; you cannot go back or go right to the root of the trouble.

Mr. Zacks: We cannot do any kind of review whatsoever of the home warranty program's decisions. We can only investigate a statutory tribunal called the Commercial Registration Appeal Tribunal, which is a body that home owners or home builders can appeal to if they are dissatisfied with certain types of home warranty program decisions.

Mr. Pollock: Basically, what you are after is to have jurisdiction to go on the site and see if this beam is faulty or that sort of thing, after the person complains?

Mr. Zacks: If the Ombudsman had jurisdiction over the program, as we do over other bodies now, we would be able to question the program officials, look at their files and they would be obliged to provide us with information. We could make recommendations. The Ombudsman could make conclusions on whether the actions or decisions of the program and its officials were appropriate and make recommendations to the program specifically to rectify what the Ombudsman thought were errors in their practices.

Mrs. Meslin: And if we had to go on site, our investigator would be able to do that.

Mr. Pollock: If you had to.

Mrs. Meslin: Yes, if we felt we had to look at it, the investigator would be able to do it, of course.

Mr. Pollock: I was always of the opinion that to go and see for yourself is by far a better approach than shuffling paper. That would be my opinion of the thing.

Ms. Morrison: Just one more thing: I think we have mentioned a couple of times the problem that this tribunal cannot remake its decision. I think your counsel can probably explain to you, in terms of the Criminal Injuries Compensation Board cases that we had before this committee the last time we were here, how critical that problem is to us being able to make any sensible recommendation. So even if we have jurisdiction just over the tribunal, any recommendation that we can make turns out to be almost useless because there is no way to fit whatever has already been decided by the tribunal. That is another part of why we need to be able to look behind the tribunal's decisions.

Madam Chairman: Could you maybe press on with the public hospitals now?

Mr. Zacks: Yes, I will press on with all deliberate dispatch.

Madam Chairman: Then I think we have some questions.

Mr. Zacks: The other day we distributed eight or so pages. The first page deals with psychiatric patients and what I will do is take you through that and indicate what we believe the potential impact of expanded jurisdiction in public hospitals would be on the Ombudsman's office.

On the first page, we have tried to compare apples and apples. We have jurisdiction over patients in provincial psychiatric hospitals and what I have done is given you the number of patients on admissions, which are the number of patients treated by the hospitals over their fiscal year on an inpatient and an outpatient basis. I have also shown you the patient on books. "On books" is the provincial hospitals' terms and that reflects the number of patients who are resident in the hospital at the end of their fiscal year. It is sort of a snapshot of what is there at any particular time.

You can see that the patients in both provincial hospitals and public hospital psychiatric units have remained more or less consistent over the previous few years. Unfortunately, I had to estimate the current number of patients because we did not have statistics available.

On page 2, on the left-hand side, I have indicated a number of total complaints, both jurisdictional and nonjurisdictional, that the Ombudsman has received from provincial psychiatric hospitals for the past five years, beside that, the jurisdictional complaints and then the percentage of jurisdictional complaints to total complaints. You will notice a dramatic decrease in 1987 to 1988, more than half of the decrease.

The explanation for that is to the best of our understanding that in 1987-88, we reorganized the way the office investigates complaints of psychiatric patients. We are applying the same jurisdictional criteria to psychiatric hospital complaints as we do in other areas and the result is that the percentage of jurisdictional complaints is much lower, much closer to the average which is 21 per cent.

On the right-hand side, I have indicated the percentage of total Ombudsman complaints to the provincial psychiatric hospital population. The reason for creating all these sort of ratios and percentages is to have some

basis of applying some consistent factors to the patient populations in the public hospitals. You will see in admissions, on average, two per cent of the population in the provincial psychiatric hospitals complain to the Ombudsman and approximately five per cent of the patients on books, that is, of the patients at any one given time, complain to the Ombudsman.

On page 3, what we have done is start estimating the impact on the number of gross complaints by admissions and on patients on books that we would expect to receive from psychiatric units in public hospitals using the percentages that we got in the same years from provincial hospitals. You can see that they vary from year to year from a high of most recently 816 to a low in 1984-85 of 393. The patients on books percentage is much lower because we are dealing with a much smaller population at any one time. What I have also done is give you a median or average of the two to indicate some type of approximation of what it might be between those two extremes.

On page 4, we have attempted to estimate the number of jurisdictional complaints that we would receive from the psychiatric units in public hospitals and we have used two different figures. We have used a 75 per cent jurisdictional ratio and a 34 per cent jurisdictional ratio. We believe that the more reasonable figure is 34 per cent because that is the current figure and we are using the current jurisdictional standards that we use in all other areas to apply to psychiatric patients as well. Again, it is much closer to the norm that we get from the general population of complaints.

On page 5, we have the estimated number of investigators required for public hospital psychiatric wing complaints, again, based on admissions, patients on books and the average. The jurisdictional complaints is based on a 34 per cent jurisdictional complaint ratio. The number of investigators required statistically is a number that is based on a relationship of 20 files per investigator that we have in our office. I mentioned this briefly the other day. There is a basic assumption we are making here, that there is a relationship of one complaint per file. This is not a realistic relationship. It is being done simply for purposes of statistical ease.

An individual file may have any number of complaints in it. An individual investigator may be handling numerous complaints but for purposes of giving you some kind of statistical basis of looking at this, we have made an assumption of one complaint per file. So on that ratio you can see that based on admissions in the psychiatric units of public hospitals, you will require 13 investigators, on books, two; the average would be seven investigators.

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However, if you look at the actual investigator complaint load, in this last year we investigated 96 complaints from provincial psychiatric hospitals. Those 96 complaints were investigated by 0.4 investigator. The way we chop up our investigators is to have four investigators allocating 10 per cent of their time to this area. If you extrapolate to one investigator, it would be approximately 240 complaints handled by one investigator on a yearly basis. If you use that figure on admissions, we would require 1.1 investigator, on books 0.16 investigator; the average would be a little under 0.6 investigator, based on the actual number of complaints investigators currently handle.

On page 6, we have attempted to estimate the number of complaints we would receive from all other hospital units in public hospitals. What we have used as a basis is the figure of 1.5 million patients under care in public

hospitals last year. It is a little less than that, by about 100,000, but we figure that when you are dealing at that level, 100,000 more or less is not going to make that much difference. So we did it at 1.5 million patients.

At two per cent of population complaining to the Ombudsman, we would get, subtracting psychiatric patient complaints, a little over 29,000 gross complaints. At 0.22 per cent, which is, again, the average complaint of the general Ontario population to the Ombudsman in all areas, we would get 3,300 complaints. Subtracting the psychiatric patients would give us a little over 2,400 gross complaints, both jurisdictional and nonjurisdictional information requests.

To determine the jurisdictional complaints, we use the figure of 34 per cent, and you can see, depending on which assumption one makes, that it is anywhere from a high of a little over 6,000 jurisdictional complaints to a low of 506.

I did a comparison to workers' compensation because we have had a fairly consistent history of workers' compensation complaints; it has remained fairly static with us. In 1986, there were 442,000 workers' compensation claims made on the board and the percentage of those claims, assuming one claim equals one complainant, is 0.35 per cent. That indicates to us that the number of total complaints we would get from public hospitals would be closer to the 0.22 per cent than it would be to the two per cent.

On page 7, we have tried to estimate, using the different assumptions, the number of investigators we would require. You can see that it can be from a high of 306 investigators to a low of 1.3. It depends again, as I said, what type of assumption one makes. We strongly feel it would not be 306.

We have looked at the jurisdictional complaints currently handled by our correctional investigators and we feel there was some similarity between the type of complaints we might get from public hospitals dealing with food and accommodation and the type of complaints we get from inmates in provincial jails.

Currently, there is a relationship of 374 jurisdictional complaints by an individual corrections investigator. One correctional investigator handles that type of complaint load, again, because an individual complainant, an inmate, could make a dozen, two dozen, 30 or 40 complaints in an individual letter. It would all be handled by one investigator in a file. But if you use that high relationship, you would get from a high of 16 to a low of a little more than one additional investigator.

Using the psychiatric relationship of 240 jurisdictional complaints per psychiatric investigator, it would be a high of 25 additional investigators to a low of 2.1 investigators if you use the 0.22 per cent ratio. In the psychiatric units, the number of investigators we would get, if you assume one complaint per file, would be from a high of 13 to a low of two and an average of seven, but if you use the current complaint load per investigator, there would be an additional investigator in the percentage to a low of 0.16 investigator, if you take really the lowest assumption. I know that is perfectly clear.

Mr. Carrothers: I will not comment on that last statement.

Mr. Zacks: I felt the same way.

Mr. Carrothers: Mr. Zacks, I wonder if I could ask a question that

came to mind as I thought over the Patients' Rights Association material that they gave us the other day, and I guess it is again back to how expanding jurisdictions to your office would impact on what you would be able to get at, I guess coming from what we talked about today as well, in a public hospital. Given that public hospitals, as I understand the way they work, are a pretty passive part of the treatment a patient gets, in that the doctor admits—that is a personal relationship usually—he talks about the treatment and the discharge is usually at the doctor's discretion. This is something I think you have been involved with already, complaints against doctors.

Mr. Zacks: We investigate complaints involving health professionals, doctors, nurses, pharmacists, dentists, chiropractors, physiotherapists, psychologists, outside the Health Disciplines Act through the various colleges and boards that regulate those professions and through the health disciplines process; not the actual regulatory colleges of the professions, but through the Health Disciplines Board, which is a reviewing body for complaints that are handled by the complaints committees of those colleges, not the actual discipline matters, but complaints that do not go to discipline. If a patient complains about a doctor and the college does not deal with it to the patient's satisfaction—

Mr. Carrothers: He gets help from the Health Disciplines Board.

Mr. Zacks: He can go to the Health Disciplines Board. Once that review is done, we can step in, but this raises the same question of that tribunal being without the authority to reconsider its decision. It is a very frustrating process for us.

Mr. Carrothers: I guess what I am getting at is whether that even changes here because that is a patient-doctor relationship. The treatment, the admission, the discharge is all at the hospital. It is all what the doctor orders and that is all that can be done.

Mr. Zacks: That is correct.

Mr. Carrothers: A nurse or some other health professional usually carries it out.

Mr. Zacks: Yes.

Mr. Carrothers: So that the hospital is sort of the location where it happens almost.

Mr. Zacks: Yes.

Mr. Carrothers: It is part of the treatment. There is not really much discretion in the treatment, so if we extended jurisdiction to the Public Hospitals Act, what are we getting at? The food, and so on, would obviously be in there, but you do not seem to get the authority, if I can just finish the thought, to pull the whole thing together, because the patient-doctor relationship is something that would be almost outside your jurisdiction, except, as the way it is now when it gets to the Health Disciplines Board. Most of the patients would presumably experience most of their treatment in a public hospital.

Mr. Zacks: That is true, except as far as there are any hospital procedures and administrative policies that govern admissions or discharges. Where those would impact on the complainant or the patient, we would have the

authority to investigate. Where it is the patient-professional relationship, we would not.

Mr. Carrothers: It would seem to me, as I understand in my experience with hospitals, that those hospital policies would be pretty tangential to the patient-doctor relationship. The bulk of the decisions would be by the doctor.

Mr. Zacks: That may be true.

Mr. Carrothers: When I talk to hospital administrators, one of the things they point out to me is that so much of what happens in their building is determined by the doctor's decisions on how the patients are going to be treated, and the hospital really does not have much impact on that.

Mrs. Meslin: I was just going to say that yesterday I think that the group that came before you gave an excellent example when they talked about visiting hours. It may well be that a doctor restricts visiting hours for medical purposes that are unrelated to the hospital administration, but if the hospital administration in its day-to-day visiting hours says you can visit only from four to six generally, that has nothing to do with the doctor, and that is an area where you would be able to say, "Is this unreasonable in a particular instance?"

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Mr. Carrothers: I understand that, because I think that is where I was getting at. But if we look at the list, as I remember it—and I do not have it in front of me now—many of the things the Patients' Rights Association was talking about were not such things as quality of food or whether the floors are clean or whether the parking lot is painted or has snow on it, which I assume are the kinds of things you would get at a hospital. Many of them seemed to have to do with the nature of the medical treatment they were getting, the quality of that and whether there had been any malpractice. We got into a long discussion over malpractice suits, on which you would have no impact at all, if I understand correctly.

There are also the comments you made earlier that somehow, if you do not have jurisdiction, you cannot even comment on it, you could not even be an agent to sort of pull all these pieces together in the hospital scene—it seems very fragmented in terms of its administration right now—you could not even act as an agent to comment on the whole, because big parts of it would be blocked out for you.

Mrs. Meslin: Certainly in terms of the professional responsibilities, as we mentioned, we would not.

Mr. Carrothers: Again, as I see it from my experience and that of my family in a public hospital, no. This is apart from chronic care or something. In a public hospital, basically you are there to be treated, you are there for two, three or four days and you are out. Most of what happens to you is determined by what the doctor writes in the chart, except for whether the food is good or something like that. I am wondering just how much it adds. It would seem that, even extending your jurisdiction, it would still be pretty limited in the impact you could have on the public hospital problems the Patients' Rights Association was talking about.

Mr. Zacks: The issues are not easy. There is likely some administrative impact on virtually all those areas they mentioned. If the Ombudsman had jurisdiction, it would be his task and obligation to decide what parts of the complaint he could look at and what parts he could not, as he does on a regular basis now in a multiplicity of hearings.

Mr. Carrothers: Would you be wanting to have jurisdiction in administrative decisions, as to how the hospital is allocating its finances, things like that?

Mr. Zacks: That would be a jurisdictional complaint. If somehow some individual is adversely affected by that issue, personally affected by that issue, we would have to consider it if we had jurisdiction.

Mr. Carrothers: I would guess that, given the nature of the problems we face in the health system, that is bound to be the case.

Mr. Zacks: That may be. How an Ombudsman would deal with that is another matter. There should not be a natural assumption that because we have jurisdiction over the complaint, it automatically means the Ombudsman would support it.

Mr. Tatham: I just noticed in this morning's Globe and Mail a story entitled, "Mental Patients Tying Up System With Complaints, Conference Told," in Penetanguishene, because they are manipulating the system and requests under the Freedom of Information and Protection of Privacy Act. Evidently, some people issue sort of blanket complaints against the nurses and against other people. Is this situation developing in the provincial hospitals?

Mr. Zacks: Because of freedom of information?

Mr. Tatham: Yes.

Mr. Zacks: Freedom of information would apply to the provincial psychiatric hospitals; public hospitals are not covered under freedom of information. The Ombudsman has no jurisdiction over freedom of information, because he is specifically exempted from investigating any complaint which may be appealed to the Information and Privacy Commissioner.

Mr. Tatham: Is this snowballing?

Mr. Zacks: We would not know, because they would not come to us. They would be dealing with the information commissioner.

Mr. Tatham: But with regard to the complaints that go to the College of Nurses of Ontario, I suppose you come in there some time later on. Is that right?

Mr. Zacks: If there is a complaint about a nurse or by a nurse that ends up at the Health Disciplines Board, we would be in a position to investigate the board's decision if someone complained to us about it. It might involve some aspect of that.

Mr. Bell: Are you finished now, everything you planned to say?

Mrs. Meslin: Could you say that a little more kindly?

Mr. Zacks: I can actually go on.

Mr. Bell: No, I do not want you to go on.

Mrs. Meslin: Ad nauseam.

Mr. Bell: There is a gentleman in this room who should be recognized for the effort he has undertaken in the fourth tab of this brief, and that is the statistical review. I would like to spend some time on it and I think he should come forward and at least get his name on the record. Would you just state your full name and position in the Ombudsman's office for the record, Larry?

Mr. Brookwell: It is Larry Brookwell, and I am manager of computer systems and operations.

Mr. Bell: Larry is the number cruncher at the Ombudsman's office and the man who intimidates me profoundly because I do not know what the hell these things are, where they come from or what they mean, and they will probably change next year and we will have to start over again.

Before we get into these individual sheets, can you just tell the committee in general terms what it is you have done and with what?

Mr. Brookwell: I think that is a good question, because what I did was put together 10 years' worth of information from our computer system at the request of Mr. Bell, but all of this information that you see before you has been gathered together from various systems over the years, and different methods for collecting information were employed at different periods, so not all of the information that we have available is directly comparable from one year to the next. You will notice that on some of the reports there are asterisks indicating that some information is missing or is not available.

What we started off to do for Mr. Bell was to put together a sort of composite of information that is similar to our annual reports that we generate today in the jurisdictional complaint area by ministry, and it is as accurate as we can make it now. We do not intend to spend a really enormous amount of effort going back and trying to correct errors that were made over the years. In general the information is fairly accurate, and it is meant to portray some of the volume of complaints that we have received in various areas as well as give an indication of how long it took to resolve the issues.

Mr. Bell: Can we just go through and identify the sheets? It is too bad they are not numbered. In the first two sheets, under the heading "Complaint Supported--No Recommendation," first of all, that refers to the ultimate disposition of the jurisdictional complaint.

Mr. Brookwell: That is correct.

Mr. Bell: The left-hand column on the two pages is obviously a list of the governmental organizations in respect of which these matters were directed.

Mr. Brookwell: Yes, that is correct, and I think in regard to that I should mention that, over the years, the agencies within a ministry and the ministries themselves have changed quite regularly. We have tried to put together the information based on today's organization of the government, not the organization at the time.

Mr. Bell: Just to give the committee members a couple of examples of how to work with this—this is actually two and a half pages—for example, for the 10 years in question, under the heading "Consumer and Commercial Relations," there have been 53 complaints which were supported without a recommendation being made.

Mr. Brookwell: That is correct.

Mr. Bell: We can go down the various categories of governmental organizations. A couple that are of interest in these discussions are Consumer and Commercial—oh, we just looked at that one.

Interjection: Social services.

Mr. Bell: Where are you? For the Ministry of Community and Social Services, we have a total of 15 under this category. Under Health we have a total of 17, and that is it.

On the third page of this document, the second-last category, "Ontario Government Total," complaints afforded no recommendation, for 10 years, 166.

"Duration" represents exactly what?

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Mr. Brookwell: It is the average duration in days from the receipt of the complaint to the final closing of the file.

Mr. Bell: Just for the record, in these average durations, the higher the number of complaints we are talking about, the more meaningful these durations become.

Mr. Brookwell: That is correct. I believe you have to look at the types of issues as well. An issue in one area may be much more complicated to resolve or to investigate than in another area.

Mr. Bell: Yes, but I think we will stick with averages for the moment. For example, one should not draw a lot of conclusions over the two cases in 1979 and 1980 that had an average duration of 491 days. One might be able to draw more conclusions over the 1982-83 figure, where the 72 took 611 days; although again your point is well taken: You have to look at what it is you have investigated and whom they were with.

Mr. Brookwell: Yes.

Mr. Tatham: This 913 in 1984-85— You had 72 complaints from 1982-83. What is it? I just wonder, is it that some of these cases start back a couple of years and drag through a period of time?

Mr. Brookwell: That is correct.

Mr. Tatham: They just happen to culminate at that time; is that it?

Mr. Brookwell: Yes.

Mr. Bell: Maybe I should have gone to the graphs first, but it is probably better to go to them at the end.

The second sheets, under the category of "Complainant Assisted," again that is three pages in length?

Mr. Brookwell: They are all three pages in length, yes.

Mr. Bell: It gives us the same type of information under this category, correct?

Mr. Brookwell: That is correct.

Mr. Bell: "Complainant Assisted" refers to assistance given to a complainant at any stage of the investigation, whether it be day one or the day when it is closed?

Mr. Brookwell: That is correct.

Mr. Reville: Could that assistance be as simple as a referral to some other agency?

Mr. Brookwell: No.

Mr. Bell: The reason is that it is a jurisdictional complaint, and by statute, unless he decides not to investigate further, he is required to investigate it.

Mr. Brookwell: The definition in our annual report is that the Ombudsman renders assistance, and that usually involves tangible corrective action.

Ms. Morrison: Referrals are usually given for nonjurisdictional matters.

Mr. Reville: I apologize. If I had read the report, I would have known that, I guess.

Mr. Bell: Again, on the third page of this sheet, there is a more detailed breakdown of the average duration. Can you give us an explanation for that?

Mr. Brookwell: Yes. Mr. Bell asked to have Community and Social Services, Consumer and Commercial Relations, Health and Housing broken down to give you some sort of idea or sense of where those areas fell within the Ontario government in total in terms of duration, because those are the areas we are looking at.

Mr. Bell: Again, the larger the statistical days, perhaps the more meaningful the average duration. Is that correct?

Mr. Brookwell: I think that is relative. In this particular case, "Complainant Assisted," I think there are enough data in almost every category to make the information relevant.

Mr. Bell: The column "Ontario Government Total" represents duration. No, that is not right.

Mr. Brookwell: That is the total number of complaints.

Mr. Bell: What I did not ask you for, and I should have, is an average duration.

Mr. Brookwell: It is there.

Mr. Zacks: There are two headings, Ontario government total.

Mr. Bell: I am sorry.

Mr. Tatham: What procedure is there? For instance, housing, 90 and 318 in the next year, 1983-84, 1984-85. Why is there such a variance?

Mrs. Meslin: The duration of any set of complaints will depend on how complex a set of complaints is. The statistics will give you an idea, overall, of how long an investigation lasts, on the average. For example, in 1983-84, in the housing area, we got a number of complaints we could assist relatively quickly and, therefore, the average duration for complainant-assisted complaints for 1983-84 for housing was only 90 days, which is a relatively quick conclusion of an investigation. But we have no control over what kinds of complaints come to our door. We cannot say to people when they come to the door that we do not want that complaint because it is too complicated and it would take us too long to do it. Then when we go to the standing committee, it will say we have been very slow at doing this because we have brought it too complicated a complaint.

Mr. Reville: What is the relevance of the data anyway?

Mr. Bell: One of the questions the Ombudsman put was, "You better look into how effective my office has been," and that should be one of the measuring sticks in respect of the question of expanded jurisdiction. There are a number of ways that could be done.

One of the ways perhaps, based on all of the jurisdictional positions over the last 10 years, is to see what they have been doing and how long it is taking them to do it. You can draw as many conclusions from this as there are people in the room looking at it. On the other hand, if things were falling off the rails totally, it would seem to me, regardless of any anomalies in the statistics, that may show up.

Also, I intend to ask the Ombudsman representatives what, if anything, they take from these, and I know they have some things to tell you in that regard. It shows in ability when you measure it against the increased number of complaints the office has received historically over these 10 years, an ability to hold the line, and that is something I think you would want to consider in deciding whether you might make decisions which would have the effect of increasing their workload further.

Mr. Reville: I think that is a hopeful interpretation. If I look at the 1987-88 totals, I might conclude that Ministry of Community and Social Services complaints were taking twice as long to resolve as they were the year before, but Ministry of Consumer and Commercial Relations complaints were being resolved much more quickly, unless you can figure out the variable of how complex the complaint was. I mean, if you got 500 complaints that there were only 27 maraschino cherries in a jar instead of 28, you would resolve those complaints fairly quickly probably, but there must be matters that arise at various times that are incredibly complex and might take five years to resolve, and that would just skew all your numbers, would it not?

Maybe one of the ways is to check customer satisfaction, how many people are outside the Ombudsman's office with a sign. The last I looked there was only one.

Mrs. Meslin: He is not there any more.

Mr. Reville: He is gone.

Mr. Bell: And that has been done as well. You may very well be right. The bottom line, after all this is done, is that you can take absolutely nothing from it. It has not been done before and maybe it is important as well to say that you cannot take anything meaningful from the statistics in respect of whether in efficiency terms they are doing a better or a worse job than they did 10 years ago. When you look at the summary sheet that shows what the average is of all of it, to my eye, you do see some form of a trend. You do see an ability to hold the line and you do see some downward movement.

I can tell you from direct experience, they do it a lot faster than they did it 10 years ago when the average duration was well in excess of these numbers you are seeing now. You are right. When you cannot control what comes in the door, you have a tough time making any meaningful statistical analysis, but I think it is worth while for the totality of your effort.

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I do not think it is useful to take the committee through each one of the subcategories. It is there for their reading. Can I turn to the last two? The first one I am looking at is the sixth last page, under the heading "Complaint Supported—Recommendation Denied." Members, just to remind you, these are the cases that involve all of the Ombudsman resources. They are the so-called total Ombudsman functions. It is from the receipt of the complaint on day one through an appearance before this committee to plead the case. Understandably, those would tend to be the longest durations.

Mr. Brookwell, just make sure I am not misstating these now. If we look at the third page of those under the duration, in the 10 years there have been 366 recommendation-denied cases reported by the Ombudsman.

Mr. Brookwell: That is right.

Mr. Bell: The bottom column represents in average terms the duration broken down by years.

Mr. Brookwell: That is right.

Mr. Bell: We do not have an average duration for the 10 years, do we?

Mr. Brookwell: No.

Mr. Bell: This is the one I was thinking of.

Mr. Brookwell: With a calculator you could generate it if it were.

Mr. Bell: Before the committee hearing started, we discussed in terms of effectiveness the percentage of these cases that were ultimately implemented. How far did we get?

Mr. Brookwell: We did not proceed with it because not all 366 complaints would have been brought to the standing committee or select committee.

Mr. Bell: No, but that is important because that means if they were not, they were either resolved to your satisfaction or they gave you an explanation that was adequate or appropriate.

Mr. Brookwell: That is correct. Of the cases that went to the standing committee or select committee, in some situations part of the recommendation would be accepted, whereas another part might not be. It is not something you can measure terribly easily. The amount of effort that would be required to go through all of the files to try to obtain that information would have taken an inordinate amount of time and resource, which we just do not have to expend on it.

Mr. Bell: The other sources are the reports of the committee.

Mr. Brookwell: That is correct. You have those reports.

Mr. Bell: Over the 12 years.

Ms. Morrison: The reports of the committee do not always give information on the complaints which were recommendation-denied cases, but which were resolved before the committee met.

Mr. Bell: The last category, "Complaint Supported—Recommendation Accepted," again are cases where there has been a complete investigation of the file and the Ombudsman has formulated conclusions and has issued a recommendation under subsection 22(3). In these cases, the governmental organization has accepted the recommendation.

Mr. Brookwell: That is correct.

Mr. Bell: Again, going to the last page, that total is 484. Under that we have again the durations. Right?

Mr. Brookwell: That is right.

Mr. Bell: If we combine the last two categories, recommendation-denied and recommendation-accepted, in the 10-year period, the number of cases wherein there have been recommendations issued to government organizations is 366 plus 484?

Mr. Brookwell: That is correct.

Mr. Bell: That is out of the total number of complaints received by your office—

Mrs. Meslin: Jurisdictional complaints.

Mr. Bell: —which are jurisdictional in that 10-year period. We do not have that before us, do we?

Mr. Brookwell: No, I did not add it up.

Mr. Bell: What, if any, conclusions do you draw from these statistics?

Mr. Brookwell: They are useful to us in some ways. I am not sure that all of it is something you could draw any conclusion from. Certainly, the supported cases, which are few in number, tend to be all over the map in terms of duration and location. It is not easy to gain much from that information. However, in other areas, we are able to see whether or not our decisions on how to investigate or how to deal with matters have changed the information.

About a year or so ago, we decided to allow telephone complaints to come in from institutions. As a result of that, the number of jurisdictional complaints from institutions dropped off. We do not consider a telephone complaint jurisdictional. We were able to measure how effective some of our programs are by looking at this information, but it is very difficult to use this information without also knowing how many investigators were involved at the time that each one of these samples were taken because, over the years, the number of investigators has changed and knowledge of the office-types of complaints we receive varies over the years as well. It is hard to use the information without first determining what you want to measure.

Mr. Bell: As you said before, one of the problems is that over the 10 years, the rules have been changed a few times.

Mr. Brookwell: That is correct.

Mr. Bell: Should you not be able by these statistics to measure on a comparative basis the efficiency of the office as a management tool?

Mr. Brookwell: To a certain extent, yes, but it is difficult to rely on information over a long period of time that is not directly comparable.

Mrs. Meslin: I think that although these statistics are helpful as a management tool, in terms of trying to decide whether we are effective or whether we are slipping, there is a whole other set of statistics, i.e., how many investigators do you have? What is their case load? How many of those ongoing cases are being held up by ministries because we are not getting responses? This causes duration. How many active cases do they have? Statistics like that over the years tend to help you in a management sense, I think, more than the ones we have before us.

Mr. Bell: You have told us this on an annual basis for the last however many years that those management indicia are improving?

Mrs. Meslin: Yes.

Mr. Bell: You are more effective per investigator now than you were five years ago?

Mrs. Meslin: We believe we are, yes.

We have also, as the committee knows, had a private consultant come in to take a look at the way in which we operate and to make suggestions to improve that operation, and we are carrying out a number of those suggestions.

Mr. Bell: When you review all of those statistics, you get the sense that the spread of complaints year to year, although there are some years that are anomalies, tends to recur from year to year in similar numbers. If you

agree with me, and I think you do, does that assist you in assessing again the potential impact of these three added jurisdictional matters?

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Mrs. Meslin: To a certain extent, I guess it would; sure.

Mr. Tatham: You made some comment about some ministries dragging their feet. Are there some who do it year after year? Is it the same people who drag their feet giving you answers, different departments or individuals?

Mrs. Meslin: First of all, you have to look at the case load. That is hard to say, because in some instances we get many more cases from particular ministries than from other ministries. Some do, but it may well be that their reasons are justified. If they are complex legal issues, it may take them a long time to respond. Some are slow in responding and we are trying to rectify that. But no, I do not think there is any particular ministry that is just dragging its feet.

Mr. Tatham: Would you say there is a general acceptance on the part of various ministries to take part and give you information?

Mrs. Meslin: Yes, I would say so.

Mr. Zacks: Except when it comes to expenditures.

Mr. Bell: I forgot to ask, Mr. Brookwell, about the three graphs you prepared; which are intended to be a graphic representation of all the sheets. First, let's just identify them. The first one is a graph on total contacts with the Ombudsman's office by fiscal year.

Mr. Brookwell: That is right.

Mr. Bell: And "contacts" means exactly what it says, whether it be jurisdictional, nonjurisdictional, or, "Where is your office located?"

Mr. Brookwell: Yes.

Mr. Bell: That tends to substantiate the practical experience of the office that more people are coming to it, particularly since 1983-84.

Mr. Brookwell: Yes, I would say so.

Mr. Bell: The second graph represents the average duration of supported complaints, again by fiscal year, where there has been either no recommendation, recommendation denied or recommendation accepted.

Mr. Brookwell: That is correct.

Mr. Bell: Are there any conclusions or comments you can make as to what those three lines are doing, other than the anomalous year, which looks like—

Mrs. Meslin: Pickering.

Mr. Bell: North Pickering.

Mr. Brookwell: Well, they do indicate that the durations can vary

upward and downward from year to year, depending on the issues. There is no trend. The only lack of trend you might appreciate is that compared to the total number of contacts and the overall activity in the office, the length of time it takes to deal with these sorts of issues has not changed dramatically. But even that is not a fair comparison, because the number of supported complaints does not vary in the same proportion as the number of contacts.

Mr. Bell: OK. The third sheet, the last one, is the average duration of all investigations by the fiscal year as per the results described.

Mr. Brookwell: That is correct.

Mr. Bell: Again, are there any comments you could make to assist the committee in this regard?

Mr. Brookwell: To a certain extent, these categories of complaints are more numerous than the supported complaints, so the trends are probably more meaningful. The only place I would sort of warn you about would be the years where we did not have all of the information for what were termed "fast actions." Those were the years 1981-82 through 1983-84. Some of the jumping around in that period could be due to the fact that we do not have the information.

Mr. Bell: Would the following be a useful analysis: a comparison of your annual budget with a comparison of graph 1 and graph 3?

Mr. Brookwell: I do not know. I think you would have a difficult time trying to really justify the comparison.

Mr. Bell: Would you? The point is that the number of contacts has gone up significantly in the last four years.

Mr. Brookwell: Yes.

Mr. Bell: When you look to the third graph, you do not see the comparable increase.

Mr. Brookwell: There are many reasons for us to be a bit more efficient over time. By employing new technologies with word processors and that sort of thing, it is possible to generate the throughput we need to deal with things that occur quickly. The fact that our budget has not gone up much over the period of time we are looking at can be explained from many sources—procedural changes, familiarity with issues and technology changes. There are all sorts of things.

Mrs. Meslin: You are also seeing the ratio. When you look at the number of contacts coming in going steadily upwards, you have to think about that in the context of Dr. Hill's expansion in the regions and his community outreach program. He has brought more attention to the office and made more people aware of the office. As a result, you are seeing that and that is without a budget increase.

Mr. Bell: That is the point. I am not going to carry your brief for you, but the point is that you have an answer here to anybody who says there is going to be a meaningful impact by any or all of the three areas. There is an ability to deal with that type of comment, using those three factors.

I have one last area and that is, further to Mr. Elliot's point and Mr.

Reville's point earlier in the day, not in the financial sense, but are you able to direct the committee to any governmental organizations that because of the presence of the Ombudsman and the Ombudsman's involvement in investigations—how am I going to put this now?—the incidence of the complaints by members of the public against those governmental organizations has decreased over the years?

Mrs. Meslin: Sure. The Ministry of Correctional Services.

Mr. Bell: As a result of your office's involvement, has Correctional Services adjusted its procedures in a way that reduced those complaints?

Mrs. Meslin: More to the point is that we are handling them differently and more quickly and efficiently. Therefore, Correctional Services understands or the inmates begin to understand the process a little better and they reduce the number of jurisdictional complaints. The number of complaints all together is reducing; it is going down.

Mr. Bell: I do not think I am making myself plain.

Mr. Tatham: Does what you do help reduce the dollars being spent by government to run an operation and to be more efficient?

Mr. Bell: That is what I wanted to say.

Mrs. Meslin: I would hope so. Certainly.

Mr. Tatham: Do you have any proof of that?

Mr. Zacks: Frank Drea, when he was Minister of Correctional Services, stated that the Ombudsman saved his ministry millions of dollars.

Mrs. Meslin: That was before my time.

Mr. Zacks: That was a result of the Ombudsman being in the institutions and acting as a pressure valve for many of the complaints that build up in institutional settings.

Mr. Bell: Maybe the question should be specifically at provincial hospitals over which you have jurisdiction. Can you tell us, has the presence of your office with the ability to investigate complaints from patients resulted in the operations being run in a better, more efficient manner?

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Mrs. Meslin: I would think so because of the recommendatory power of the organization and the ability of those agencies to accept the recommendations on a wide scale. We would have to say yes.

Mr. Bell: Maybe the question should be asked of some ministry people, I guess, eh? That is all I had.

Madam Chairman: Any further questions on this point from the committee? I just have two housekeeping matters. The first is that we are reconvening at one o'clock on Monday afternoon for Mrs. H, and we will be in this room. The second is that for those who are returning on Monday, Mrs. H is in your binder.

Interjection.

Madam Chairman: In paper form. What was the terminology used earlier today?

With respect to the cases in your book, however, there was some concern that the numbers on the pages were not in order and did not coincide with those of the Ombudsman's office. For those who will be here Monday, perhaps you would like to get the new grouping. The old grouping has the same pages—just new numbers—and it is easier to carry home over the weekend as opposed to the entire binder, for which you require a camel as well. As far as we know, this case will be heard Monday at one. If there is any change here, we will inform you of that, but as far as we know right now, it is pressing ahead on Monday at one.

Any further questions?

Mr. Tatham: I just want to say thank you. I have enjoyed working on the committee for the past two weeks.

Madam Chairman: Oh, good. Thank you, Mr. Tatham.

Mr. Reville: May I just say something in respect of the last item of questioning by Mr. Bell. Members of the committee might be interested in looking at the Provincial Auditor's report in respect of the provincial psychiatric hospitals to provide themselves with some additional information about his view of the efficacy of the operation. He did a report on that matter for 1987. It was reviewed by the public accounts committee, which then made a number of recommendations to the Legislature, which typically were not debated. But there is a report with a whole series of recommendations about how to improve the provincial psychiatric hospitals.

Madam Chairman: We will make sure we obtain a copy of that.

Mr. Reville: It is quite concise if people are curious.

The committee adjourned at 4:32 p.m.

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STANDING COMMITTEE ON THE OMBUDSMAN
EXPANSION OF OMBUDSMAN'S JURISDICTION
MONDAY, AUGUST 22, 1988



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Elliot, R. Walter (Halton North L)
Bossy, Maurice L. (Chatham-Kent L)
Bryden, Marion (Beaches-Woodbine NDP)
Carrothers, Douglas A. (Oakville South L)
Henderson, D. James (Etobicoke-Humber L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
Mackenzie, Bob (Hamilton East NDP)
McLean, Allan K. (Simcoe East PC)
Pollock, Jim (Hastings-Peterborough PC)

Substitutions:

Campbell, Sterling (Sudbury L) for Mr. Carrothers
McCague, George R. (Simcoe West PC) for Mr. McLean
McClelland, Carman (Brampton North L) for Mr. MacDonald
Philip, Ed (Etobicoke-Rexdale NDP) for Mr. Mackenzie

Clerk: Carrozza, Franco

Staff:

Wilson, Jennifer, Research Officer, Legislative Research Service
Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon

Witnesses:

From the Office of the Ombudsman:

Meslin, Eleanor, Executive Director
Morrison, Gail, Director, Investigations
Zacks, Michael, General Counsel

From the Ministry of Education:

Skelton, Janet, Manager, Teachers' Superannuation Unit

From the Teachers' Superannuation Commission:

McArthur, Dan F., Director

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Monday, August 22, 1988

The committee met at 1:08 p.m. in committee room 1.

OMBUDSMAN'S RECOMMENDATIONS DENIED

Madam Chairman: I will call the meeting to order. I think we just have to deal with our case today, unless anybody from the committee has anything he wants to bring up before we commence.

Seeing none, we have today the case of Mrs. H and the Ministry of Education. If the individuals from the Ministry of Education would come to the table, we would appreciate that: Janet Skelton and Dan McArthur.

Normally the process we have is that the Office of the Ombudsman makes a brief opening statement, which is usually done by Dr. Hill, but in his absence today, the executive director, Mrs. Meslin, will be doing that. Then we allow Ms. Morrison to do a presentation of the facts and more or less the Ombudsman's side of the issue and the story.

Questioning is allowed after they complete their presentation, and then it will come to you, as the ministry, to make some kind of brief remarks and, again, questioning. There really is no opportunity for you to make any comments initially, unless you hear something you are blatantly opposed to in some way, and then if you will just signal to me, I will be sure to come to you. But it is quite often easier if just one side gives the facts of the story first.

Mrs. Meslin, if you have a few opening remarks, please proceed.

Mrs. Meslin: Mrs. H is an elderly widow in failing health. She was married for three years to Mr. H, a former teacher, after his first wife died. Unfortunately for Mrs. H, this was also after Mr. H's retirement. As a result, she is not eligible to receive survivor benefits from his pension. The Ombudsman found the provisions of this pension plan unreasonable and discriminatory in that Mrs. H is treated differently from other surviving spouses by this pension plan. She is denied the benefit on the basis of the timing of her marriage to Mr. H, and this denial is not justified.

In bringing this case to your attention, the Ombudsman wishes to remind you that your own pension plan has been amended to eliminate this very problem. Spouses of members of the Legislative Assembly retirement allowances plan will receive survivor benefits whether or not they married the plan member after his or her retirement. I believe, in considering this case, you will not wish to see Mrs. H treated less well.

Madam Chairman: Thank you, Mrs. Meslin. Ms. Morrison.

Ms. Morrison: I am going to follow the materials in your binder. We received a renumbered set of materials late last week, and those are the ones I am going to use.

Madam Chairman: You are going to use just the materials we received on Thursday, the new set?

Ms. Morrison: That is right.

Madam Chairman: Is anybody without a set of those? OK.

Ms. Morrison: If you see any problems with my page numbers, if you cannot follow what I am saying, I would ask that you please signal, because there may still be one or two pages which I have numbered differently from yours. I just want to make sure we are always talking about the same document.

Elaine Buckstein, who was the investigator on this case, will assist me in presenting these facts to you.

I would ask you to first turn to page 2, which is the synopsis of the case of Mrs. H. I was advised by the ministry on Friday that it would agree that this was a reasonable statement of agreed facts, given that we had not had another opportunity to meet on this matter.

I would just like to go through those facts briefly with you. I think they are fairly straightforward. If you have any questions, please stop me.

Mrs. H is a widow. She was married to Mr. H, who paid into the teachers' superannuation fund from 1928 until 1972. Mr. H had been married three times prior to his death. His first two wives predeceased him. He was married to Mrs. H, the present complainant, in 1982.

Prior to that, in 1974, he inquired of the commission about his wife's entitlement to a dependant's allowance. That is, should something happen to Mr. H, he wanted to know that Mrs. H would receive some portion of his pension.

He received a letter from the commission advising him that his then wife would be entitled to a dependant's allowance should he predecease her. That letter from the commission did not mention the possibility that Mr. H's then wife would predecease him, perhaps not surprisingly, and it therefore did not advise him that any subsequent spouse married to him post-retirement would not be entitled to the allowance. That Mrs. H subsequently did predecease Mr. H, and he married the complainant in 1982. At that time, he had been retired for 10 years.

After his death in 1985, his widow, Mrs. H, the present complainant, received notification that she was not entitled to receive dependant's allowance because her marriage to Mr. H had taken place after the date of his retirement in 1972. She did not feel this was fair and she came to us. If you look in the rest of the materials, you will see that in fact she went to her MPP, who forwarded her correspondence to us for consideration.

The provision that prevents Mrs. H from entitlement to a dependant's allowance is one which provides that a spouse of someone married to that person after retirement cannot take the usual dependant's allowance. So in the usual case, that is, in the case where Mrs. H had been married to Mr. H all his working life, she would have been entitled to a dependant's allowance.

There is another class of people who are also entitled to a dependant's allowance. Those are people who, under a subsequent amendment to the act, can elect, if they are married after retirement, to have their own pension reduced but to provide for a dependant's benefit for their wife, should she survive, or husband, should that be the case.

That amendment, which allows for that kind of election, was passed in

1983, and it does not apply where the pensioner retired before September 1, 1984. Mr. H retired in 1972, so he had no opportunity to take advantage of this amendment and elect to have his own pension reduced so that his wife could receive a dependant's allowance.

As Mrs. Meslin mentioned in her opening remarks, the Legislative Assembly Retirement Allowances Act formerly contained a provision exactly like that, the one that we are questioning today in the Teachers' Superannuation Act. That provision prohibited a surviving spouse from receiving a spouse's allowance if the marriage took place after the pension began to be received.

In 1984, those provisions were eliminated, so that the plan to which you, as members of the Legislative Assembly, belong does not contain the restriction which applies to Mrs. H and which we are arguing is unfair. That change in the provision, by the way, was made in 1984 and was made retroactive to 1977.

The Ombudsman's conclusions and recommendations are set out on page 3 of your material. I will go through them in some detail and I will be prepared to answer any questions you have, once I have finished explaining the kinds of conclusions and recommendations and the reasons for these particular conclusions and recommendations.

The first of the Ombudsman's conclusions is that the decision to deny the survivor allowance to Mrs. H because she was not married to Mr. H at the time of his retirement appears to be a decision taken pursuant to a subsection of the Teachers' Superannuation Act which contravenes the Charter of Rights and Freedoms. Specifically, we have argued that this subsection, subsection 36(2), contravenes subsection 15(1) of the Charter of Rights and Freedoms.

Subsection 15(1) is the subsection of the Charter of Rights which is called the equality provision. If you wish the text of that provision, you can turn to page 65, which sets out subsection 15(1) of the charter. I will read it for you just for the record: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability."

That subsection of the Charter of Rights and Freedoms has been considered by a number of courts. In those court decisions, it has been clear that the list of grounds for discrimination which are set out in the charter—that is, race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability—is not an exhaustive list.

In other words, the courts have held that this subsection of the charter prevents discrimination on grounds other than the listed grounds. We are contending in this case that this particular provision of the Teachers' Superannuation Act discriminates against Mrs. H on the basis of her marital status, specifically the time at which she was married.

As you will see if you have read the material, the Attorney General (Mr. Scott) does not agree with that view. I think we would be prepared to concede that there may be some difficulties with the view in a couple of respects. One of them is that the ground of marital status is not usually interpreted in exactly the way we have interpreted it. On the other hand, the list of grounds in the subsection is not exhaustive and, therefore, there are other grounds which have been called discrimination, and this could be discrimination on a ground other than marital status.

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In any case, one of the reasons for this particular conclusion is, first, it seems a very reasonable conclusion in the Ombudsman's opinion that this particular section contravenes the charter and, second, if the section contravenes the charter, then that would make the section of no force and effect. If the section had no force and effect, then Mrs. H could not be denied her survivor's pension and she could not have been denied it in the past. So if the section contravenes the Charter of Rights, that has the effect of retroactively removing the section and making Mrs. H entitled to her survivor's pension from the time at which she applied.

That is the Ombudsman's first conclusion, and to go with that conclusion recommendation number 1 is that the Attorney General, in conjunction with the Ministry of Education, take appropriate steps to amend the act to remove the offending section; 2, following these amendments, that the Teachers' Superannuation Commission take the necessary steps to issue a dependant's allowance to Mrs. H in accordance with the amended section, effective from the first day of the month following the date of her inquiry for the same.

Under those conclusions and recommendations the Ombudsman feels that the section contravenes the charter. If it contravenes the charter, it is of no force and effect, and being of no force and effect, Mrs. H should be entitled to her allowance from the date of her application.

In the alternative, the Ombudsman argues that the decision of the Teachers' Superannuation Commission to deny the survivor allowance is in accordance with the provision of the act that it is improperly discriminatory within the meaning of the Ombudsman Act. As you know and as you have been obliged to hear many times in this room about the Ombudsman Act and its various provisions, under section 22 the Ombudsman can come to the conclusion that a particular act or decision or omission is improperly discriminatory. In this case, although his first conclusion says that he believes that this provision contravenes the charter, he also believes it to be improperly discriminatory within the meaning of the Ombudsman Act.

The conclusion that the provision is improperly discriminatory leads to a slightly different recommendation; that is to say, if the committee does not believe that this particular provision contravenes the Charter of Rights but does believe that it is improperly discriminatory within the meaning of the Ombudsman Act, then the recommendation would be that the legislation be amended to take out the offending, improper discrimination.

But if that amendment is made, we believe that this particular complainant would be unjustly dealt with because that amendment would not deal with her particular allowance. We, therefore, have recommended under recommendation 4, that the Ministry of Education, in conjunction with any other governmental organization deemed necessary, issue an ex gratia payment to Mrs. H to give her the benefit of the amendment, although the amendment cannot come into effect so as to provide for her allowance from the date that she applied.

The reason that we have recommended this ex gratia payment is twofold. First of all, if we feel that the provision is unfair, then we feel that it is unfair to Mrs. H that she has not received her allowance. But there is another reason, and that reason is that we often have complainants come to us, bringing us problems which result in our recommending legislative change. If those complainants never get the benefit of the legislative change, then they

throw up their hands and say, "What good is it for us to go to the Ombudsman? He is very good at getting changes which will affect people in the future but he cannot actually do anything for individual complainants." We believe in this case that this individual complainant, having come to us and raised this problem, ought to have justice done for her particular case and not just have to be satisfied with a victory in principle.

We then have to deal with the problem of other people who might be in the same situation. Clearly, Mrs. H is not the only widow of a teacher who has married a teacher after retirement prior to 1984 when the election could be taken. It is our view that other surviving spouses who might, as a result of the Ombudsman's recommendation, bring forward a request for their survivor's benefit ought to be treated in the same way, to the extent that they should receive an ex gratia payment payable from the first day of the month following their request for the survivor's benefit. Our argument there would be that these people are coming forward as a result of a change that would be made and from the day of their application they ought to be viewed in the same light as Mrs. H.

We have had, as you can see from the very thick sheaf of documents, a number of pieces of correspondence back and forth with a number of governmental organizations. Just for your information, I would like to set out the reason there are so many different governmental organizations involved.

The first governmental organization involved, and the one to which we sent the 19(1), is the Teachers' Superannuation Commission. The commission pays out benefits to teachers under the Teachers' Superannuation Act. They are the people who made the decision not to pay and it is their decision that we feel is in accordance with an act that is unjust, improperly discriminatory or contravenes the charter, so they are a natural part of this complaint.

Their response to us was, and we believe quite justifiably: "We cannot make this payment, because the legislation does not allow us to make this payment. We therefore are recommending that the legislation be changed." There is not much point recommending to the Teachers' Superannuation Commission that the legislation be changed, because it is not its job to change the legislation, so that recommendation was made to the Ministry of Education and to the Attorney General. The Attorney General's involvement arises partly because we are talking about a charter problem, and it is the Attorney General's business to look into the laws of this province and make sure that they do not contravene the charter, so the Attorney General becomes involved in that way.

The other body you will see in the correspondence is the Pension Commission of Ontario. They have been involved partly as a matter of providing them with information and partly because they sort of oversee various provisions of the various pension funds and have an interest in information of this type.

As far as the responses of these various organizations are concerned, I would like mainly—

Mr. Bell: If you are about to leave the synopsis, I would like to accept your invitation to ask a couple of questions before you get into the material, if that is all right.

Ms. Morrison: Sure.

Mr. Bell: Can you just help me? At page 3, which is page 2 of the synopsis, you set out the two conclusions of the Ombudsman.

Ms. Morrison: Right.

Mr. Bell: Do I take it that recommendations 1 and 2 flow from both of those conclusions? The reason I ask you that is that he goes on to say "If my second conclusion alone is accepted," then we go to three and four.

Ms. Morrison: That is right. I do not think it is necessary to say that recommendations 1 and 2 flow only from conclusion 1.

Mr. Bell: No; that is not what I asked you. I said, do recommendations 1 and 2 flow from both conclusions 1 and 2?

Ms. Morrison: Yes, although, as I was trying to point out before, the advantage of conclusion 1, the Charter of Rights argument, is that if subsection 36(2) contravenes the Charter of Rights and is of no force and effect, then the entitlement to the survivor's pension can date from the application of Mrs. H because the section was never of any force and effect.

Mr. Bell: A section is only of no force and effect if a court says it is not.

Ms. Morrison: Well, it is and it is not. The Attorney General brought forward a whole lot of provisions in the laws of Ontario to be amended by the Legislature without taking them to the court.

Mr. Bell: I know, but that legislation did not declare anything to be null and void; it just repealed and replaced.

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Ms. Morrison: That is right.

Mr. Bell: Is that not what you are seeking here?

Ms. Morrison: This could be repealed and replaced.

Mr. Bell: Specifically, are you asking that subsection 26(3) of the legislation be repealed? I am at the top of page 26, members, which is the section I believe the Ombudsman is most concerned with.

Ms. Morrison: Yes.

Mr. Bell: It says: "Subsections (1) and (2) do not apply to the surviving spouse of a deceased person if they became spouses after the date of the deceased person's last day of employment in education."

Ms. Morrison: That is right.

Mr. Bell: Specifically, are you seeking that this be repealed?

Ms. Morrison: We are arguing that subsection 36(2), which is the subsection that applied at the time of Mrs. H's application and which has a similar exclusion to that in subsection 26(3), offends the charter or is improperly discriminatory and that the act should be amended to remove the discrimination.

Mr. Bell: Without specifically saying how to do it. Do you intend that the amending legislation be retroactive?

Ms. Morrison: Yes.

Mr. Bell: So there would be a specific retroactive provision going back to April 17, 1985?

Ms. Morrison: That is right.

Mr. Bell: The significance of that date is that it is the date the charter came into force.

Ms. Morrison: That is exactly right.

Mr. Bell: Explain to me, if the committee agrees with only your second conclusion—that is, that the legislation is improperly discriminatory—can it not look to the first two recommendations only?

Ms. Morrison: The first recommendation and the timing of the first recommendation are based on an assumption that there is some connection between the need to amend and the Charter of Rights. Since the Charter of Rights was effective April 17, 1985, the amendment which removes the offending provision would be retroactive to April 17, 1985.

If the committee agreed with conclusion 2, it would still be open to the committee to suggest an amendment that is retroactive to April 17, 1985, but the logical connection is not as strong. In fact, then they might as well recommend an amendment effective to the date Mrs. H applied. It would not matter that it be April 17, 1985, because there is no logical connection between that date and anything else if you are not talking about the Charter of Rights and Freedoms.

Mr. Bell: Why did you bring all the other potential spouses into recommendations 3 and 4, and not 1 and 2?

Ms. Morrison: Because in recommendations 1 and 2 they would automatically come in, and the Teachers' Superannuation Commission, in its final response to us, had suggested that although it may be difficult to reach all of the possibly affected people, there may be some reasonable way to advertise the change in the provision so that people affected could apply and be taken care of.

Mr. Bell: Aside from these additional people, is not the only difference between recommendations 1 and 2 and recommendations 3 and 4 the retrospective nature of the amending legislation?

Ms. Morrison: Yes.

Mr. Bell: Because if recommendation 3 were to read "amended and make it retroactive effective"—pick a date—there would be no need to worry about an ex gratia payment.

Ms. Morrison: That is right.

Mr. Bell: I am going to play legalese with you. How do you bring these people in?

Ms. Morrison: Which people?

Mr. Bell: The other people you refer to in recommendation 4.

Ms. Morrison: In practical terms or in legal terms?

Mr. Bell: In terms of your legislation. You have all the authority in the world to make a recommendation with respect to this particular complainant. Where do you get the authority to bring all these others in?

Ms. Morrison: Our authority?

Mr. Bell: Yes.

Ms. Morrison: In terms of jurisdiction because we have had no complaints from these people? Is that your problem?

Mr. Bell: In any terms. What is it about this particular complaint that gives you the authority to make a recommendation that covers all of the other potential people?

Ms. Morrison: Where we recommend changes in legislation, many times our recommendations will affect many other people besides the complainant.

Mr. Bell: I grant you that, but I do not think I have ever ^{seen} a recommendation from your office before where you specifically say, "I want you to make ex gratia payments to an undetermined group of individuals," provided, I guess, they come forward and show entitlement. I am just a little concerned that you may have crossed over the line.

Ms. Morrison: What line?

Mr. Bell: The line of your authority.

Ms. Morrison: In workers' compensation complaints, for example, when we suggest a change in the legislation, the change will affect all kinds of other workers. The Workers' Compensation Board in fact has the machinery with which it can go back and check to make sure that other people who would be entitled under the amended legislation are paid. How different is that from this?

Mr. Bell: I do not deny that the effect of recommendations implemented has, in some cases, a substantial ripple effect. I do not think anybody would quarrel with the fact that any of these recommendations, if implemented, would have some effect, but that is not what you are seeking. You are not seeking an amendment here and then letting the effect take place; you are seeking a specific entitlement to an, as yet, unidentified group of individuals.

Ms. Morrison: I think what we are seeking is some sort of fairness. If Mrs. H becomes entitled to an ex gratia payment, by virtue of this committee's deliberations, which provides her with a benefit that she would otherwise not have been entitled to, we know for a fact that we have a number of other complainants who will come forward or who have come forward, but are not presented here. It would seem to us to be unfair to provide the ex gratia payment to Mrs. H without considering that this may then just lead to a new unfairness; that is, an unfairness to the others who are in exactly the same situation. I do not think we should be obliged to bring each of those cases to this committee's attention in order to have the unfairness removed.

Madam Chairman: Are you finished? Mr. Campbell, just on the point of the recommendations and issues, please.

Mr. Campbell: I just wanted to clarify what was said about—may I use the term?—class action. You might clarify for me what you are asking about. Is that basically what either side is discussing, a class action, and you are representing one to represent the whole class of people who are allegedly discriminated against?

Ms. Morrison: It is similar. I think our view is that we have here a complainant and our process is usually complainant-driven; that is, a complainant or a group of complainants comes to us. We have in the past brought to this committee complaints by whole groups of complainants.

In this particular case, we are not bringing a case from a whole group of complainants, but the outcome of this case will affect a very diverse group of other people, some of whom are already complainants to our office and some of whom are not. Therefore, the outcome of this case will affect those people in much the same way as a class action would.

Mr. Campbell: So the result is the same. If you had another complaint that was brought to you on another section of the act which said that one group of teachers can buy back a pension, and somebody in exactly the same position, save one summer course, cannot, would that include a class action for all the teachers who are dealing with another aspect of pensions, clearly discriminatory, where you have teachers teaching the same subject at the same school, and one buys back his pension and the other one cannot because there is some regulation? Would that be a class action in the meaning you are defining? Just help me to understand it a little bit.

Ms. Morrison: It depends. We do get a lot of complaints about buying-back provisions, some of which we have not supported and some of which we are still investigating. It will depend very much on whether there are people in exactly the same position.

This particular complaint is a bit different from the one you suggest because if we went to look at that, we might find people who have taken two summer courses, someone who has taken a night course, someone who in 1943 had done a certain thing and then had come back into teaching. There might be a lot of different circumstances, not all of which could be lumped together.

The circumstances in this case are all going to be identical. There is no difference between a person who was married in Toronto and one who was married in Peterborough. The circumstances of their entitlement are exactly the same, so this lends itself much more easily to being fixed by a kind of class action approach.

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Mr. Campbell: But they would be. If one board of education had rules at the time that allowed certain things to happen, that teacher in community A would be able to buy back. The other teacher in community B, because his or her board did not support certain things, would not be allowed that buyback.

For example, there are women who got leaves of absence for pregnancy. One board allowed a lot of leaves of absence, especially a northern board where it was tough to get teachers in the 1960s. The woman was allowed to buy back her pension for those years of childbearing when she was away with her family. Board B, which is right next door, said you had to quit and come back. Therefore, you were not entitled to a pension buyback.

Would that not be a class action, to treat both people in similar

situations in the same way? I am just trying to understand how far this discrimination goes.

Ms. Morrison: It might. We would have a problem there because if you are talking about a board decision, that is a nonjurisdictional decision to us.

Mr. Campbell: Except that the pension result is.

Ms. Morrison: But it has to be a decision of the pension commission.

Mr. Campbell: Well it is, as a result of the board's action on the pension.

Ms. Morrison: It might very well. I cannot really say whether it would lend itself to the exact treatment that this does. This is a very easy case in the sense that it is very easy to determine whether a person was married or whether he was married before or after he retired. There are no other facts that have to be gathered. It is pretty straightforward and therefore a fairly easy class action sort of arrangement.

Mr. Campbell: One last question has to do with the propriety of legislation that is already in place by regulation while the superannuation commission is still not paying, even though it says clearly in the regulations that it shall pay. If somebody brought that to the Ombudsman's attention, would that affect everybody in that category? In other words, if you were able to tell the superannuation commission, "It says right there in the legislation you have to do it and you are not doing it," can you make recommendations for them to do so?

Ms. Morrison: No, we cannot. We get very good co-operation from the Teachers' Superannuation Commission in terms of bringing up problems. When we have found a problem on which they agreed with the problem, we have usually had no difficulty in agreeing with them on what needs to be done.

Mr. Campbell: The key phrase though is "if they agreed."

Ms. Morrison: I think the case you are talking about sounds very much like, "It says such and such here and this is not happening," unless there were some very good reason that it was not happening.

Mr. Campbell: Yes.

Madam Chairman: Thank you, Mr. Campbell. It seems appropriate, after you have spoken, to recognize an honoured guest, one of the people watching us today. That is Margaret Campbell, a long-time member of this Legislature. I think almost everybody has sent me a note to recognize you here today. You must be doing well to have retired from this assembly and be recognized by all. We welcome you today. We are getting to see your son in true form.

Mr. Campbell: She had better not be checking up on me.

Madam Chairman: Ms. Morrison, could you complete?

Ms. Morrison: I would just like to draw to your attention a couple of the responses we have received to our final report. I am not going to go through all the responses, by toing and froing, that we have supplied to you in your binder.

Some of those, as Mr. Bell has pointed out to you in the past, are there

just to provide you with the information that we have followed our process appropriately, that we have sent the appropriate subsection 19(3)s, that we have waited for responses and that we have considered those responses and have come finally to the final report.

I would like to draw your attention to a couple of the final responses. The first one I would like you to note is at page 80 of your materials. If your pages are numbered the way mine are, this should be a letter from the Teachers' Superannuation Commission, dated July 13, 1988, to Dr. Hill. In this response, which is the final response from the commission concerning our final report, the commission notes that it is "pleased to note that you concur that the commission is implementing the legislation as written."

That is just a confirmation of what I said earlier, that the Teachers' Superannuation Commission was in fact following the legislation, which is why we had to recommend that the legislation be changed. The Teachers' Superannuation Commission is just confirming that here. You will note not the next paragraph but the one after that, which I think is of particular interest and I ask you to read it in its entirety:

"The commission is of the opinion that the legislation determines who is eligible for the survivor benefit in this case. Should the legislation be amended, the commission shall implement the amended version as quickly and as fully as possible. While no question exists as to the identity and whereabouts of the appellant in this case,"—that is our complainant—"other survivors may have been denied consistent with the legislation. Such denials may have involved simply a telephone call from the potential survivor, requesting information regarding the current act. Such a call may not have been recorded.

"Hence your recommendation 'that payments be made to any other surviving spouses who have been denied a full dependant or survivor allowance,' if implemented, may be limited to those who step forward in response to advertisements in the appropriate media."

I think that is confirmation of what I was saying a few minutes ago, that there are practical ways of implementing these recommendations. Although they might not be absolutely totally satisfactory, they do provide that the provision could be implemented reasonably fully.

The next letter that I would like to draw your attention to is at page 87. This letter is the result of a meeting that we had with the Ministry of Education staff in an attempt to resolve this matter. At that meeting, there was "agreement in principle that the Teachers' Superannuation Act appears to be unfair to Mrs. H." This is the beginning of the second paragraph.

"The Ministry of Education is supportive of the need for a review of the act and for consideration of statutory amendments. Other ministries, however, including the Ministry of the Attorney General, Ministry of Financial Institutions, Ministry of Treasury and Economics and Management Board of Cabinet, must be consulted in the process. The Ontario Teachers' Federation would also be involved. Although we do intend to participate in a review of the Teachers' Superannuation Act, time is required to complete it and to develop whatever amendments may be required."

This, in essence, is the ministry's final response to our final report. Essentially, they are agreeing that the provision in the Teachers' Superannuation Act appears to be unfair and that there is a need for review and there may be a need to amend the provision. What this letter did not

address was any of our recommendations specific to the complainant or specific to spouses of retired teachers who may have been affected by the impugned section of the statute.

Dr. Hill reviewed this response from the ministry and informed the ministry in the letter that is at page 89. He noted that the ministry is supportive of the need for a review of the act and that it intends to participate in the review, but he did not feel that this was an entirely adequate and appropriate response to his final report, given that there was no response to the specific recommendations made with respect to Mrs. H. After that exchange, the materials were forwarded on to the committee for your consideration.

Mr. Bell: Ms. Morrison, would you just review the to and fro between the Ombudsman and the Attorney General about section 15? I think it is important for the committee to understand your initial position that it was discrimination on the grounds of marital status; the Attorney General's response to that, disagreeing that marital status was the discriminatory action; then Dr. Hill's counter to that and, finally, the last response of the Ministry of the Attorney General, which I believe is represented by his letter of July 28, 1988, at page 84.

It is important for the committee members to understand fully where both sides are on the contrary-to-15(1) issue. Can I help?

1350

Ms. Morrison: The Ministry of the Attorney General's response to our 19(3) is at page 43.

Mr. Bell: That is it.

First of all, for all of the reasons set out in the 19(3) letter, which starts at page 62 and specifically is covered in pages—

Ms. Morrison: The 19(3)? Sorry, the 19(3) starts at—

Mr. Bell: I am sorry. I am dealing with 22(3).

Ms. Morrison: It starts at page 23, and there are three beginning pages or four beginning pages, depending upon whom we sent it to.

Mr. Bell: That is right. For the record, starting at about page 27 and going through to and including page 29 at least is the reasoning of the Ombudsman supporting his tentative conclusion at that time that there is discrimination contrary to 15(1) on the grounds of marital status.

Ms. Morrison: That is right.

Mr. Bell: Again, the Ombudsman rightly noted that marital status is not an enumerated ground of 15(1) but looks at the cases that have said: "You don't need it. It's not confined to those enumerated grounds." If it is not an enumerated ground, there is a test that the court has set forth, and he reviewed the facts against the test and concluded that the test was met.

Ms. Morrison: That is right.

Mr. Bell: Then the Attorney General, at the request of the Minister of Education (Mr. Ward), responded to that position. Where is that?

Ms. Morrison: We forwarded the Attorney General a copy of the 19(3). They are responding to that letter at page 43.

Mr. Bell: But I think it is also important to note that the minister, Mr. Ward, also sought advice from the Attorney General.

Ms. Morrison: That is right.

Mr. Bell: At pages 43 and 44, Mr. Scott sets forth his opinion as a response to the 19(3), and his reasoning is that the restriction relates to the timing of the marriage and not marital status.

Ms. Morrison: That is right.

Mr. Bell: That is really, I think, all the letter says. I do not mean to be pejorative, but it is a very succinct opinion: Marital status is not in issue here. They are all married, whether entitled or not. It is the timing of that marriage in relation to the vesting of the pension benefits.

Ms. Morrison: That is right.

Mr. Bell: Then Dr. Hill, in his 22(3) report, responds to that. Could you review that with the committee members so they have a full understanding of what Dr. Hill's position is as of the time of the 22(3) report?

Ms. Morrison: OK. That is page 77 of your materials. The very top of page 77 sets out the essence of the Attorney General's response; that is, his view that the only restriction set out in the provision was one relating to the timing of marriage but not the nature of the marital relationship per se. Dr. Hill states, as you see in the next paragraph:

"In my respectful opinion, it is precisely Mrs. H's status as a spouse which has been denied for the purposes of the Teachers' Superannuation Act. Although she was married to Mr. H and is in fact his surviving spouse, she is being treated differently; that is, she has been discriminated against simply due to the timing of their marriage. In my view, this limitation violates section 15 of the charter."

I think the Ombudsman's view there is that Mrs. H was a spouse of Mr. H but is being treated by the act as if she were not; that is, she is not entitled to the spousal benefits that she otherwise would have had, had she been married to Mr. H prior to his retirement.

Mr. Bell: Or to use the language of subsection 15(1), she has been subject to unequal treatment vis-à-vis other spouses who are receiving benefits, and the reason for that unequal treatment is the timing of her marriage.

Ms. Morrison: That is right, and the argument goes on to say that if the discrimination is not discrimination on the basis of the nonenumerated ground of marital status per se, then, in the Ombudsman's view, the matter should not fail on that basis for the Ombudsman is prepared to find that Mrs. H was discriminated against on the basis of the timing of her marriage.

Mr. Bell: So when the committee considers the Ombudsman's conclusion referable to subsection 15(1) and the discriminatory effect of that section, it is timing of the marriage that is the specific ground?

Ms. Morrison: That is right.

Mr. Bell: To complete this chronology, at page 84 of your material, the Attorney General responds to what Dr. Hill said in his 22(3) report, what we have just been talking about.

Ms. Morrison: He makes essentially no comment. The letter does note that the Attorney General had responded to our argument and indicated that it was not discrimination on the basis of marital status, and then states only, "Your report takes issues with this view, but also raises a second possible concern under the charter, discrimination on the basis of the timing of the marriage." That is not dealt with in substance by the letter from the Attorney General.

Mr. Bell: And again, the important thing for the committee members to note is that whereas—the best way of putting it is that the Attorney General has not come forward with an opinion that the timing of the marriage ground does not offend 15(1).

Ms. Morrison: That is right. There is no opinion on that.

Mr. Bell: Are you aware of any discussion between the Attorney General and the Ministry of Education, or otherwise, as to this issue?

Ms. Morrison: No, I am not.

Mr. Bell: Thank you.

Madam Chairman: Did you have anything to close up with, Ms. Morrison?

Ms. Morrison: Yes, I did. I just had one more point that I thought it was important for the members to consider.

There is some correspondence in the binder which is the initial responses from the Ministry of Education in which there is some talk about the problem of providing this benefit to someone who marries after retirement, because of what the ministry quotes as the original agreement in the pension.

Just to clarify for the members of the committee, the payment into this pension plan does not depend upon your marital status, that is, you do not pay a different amount in depending on whether you are married or have children, or have 10 children, or whatever. There is no initial agreement that you are never going to have a spousal benefit under this plan.

So the initial arguments with which the ministry responded to our 19(3) do not make any sense in that context. You cannot talk about an original contract if the original contract did not deal with this specific term. In fact, people who contribute to the pension plan and never marry and never have children, to some extent, I guess, could be seen to be disadvantaged in a pension plan because the pension plan does provide spousal benefits and dependants' benefits to those who deserve them.

But the basis upon which the payments in is determined is on the whole class of people who are paying in. There is a kind of actuarial assumption as to how many people will eventually marry, how many people will die at a certain age, how many people will have how many children and how many dependants' benefits will be eventually paid out of the plan. Therefore, there is no real sort of individual contract with individual people, as to whether they are going to end up having spousal benefits or not.

I just wanted to make members of the committee aware that the payment into the pension plan is not dependent upon whether you have a spouse or do not have a spouse, or whether you have dependants or do not have dependants.

Madam Chairman: Thank you, Ms. Morrison. Mr. Campbell.

1400

Mr. Campbell: A part of it that concerns me too is when you are talking about an original contract made by people. What if the rules change for retirement? In the normal course of events, would that be considered to be a part of the agreement if subsequently the legislation was changed? For example, now in force until August 1990, teachers at any age who have taught one or more days in each of 35 years may retire without penalty. That would lead me to believe that survivors' benefits would follow at some appreciable period of time if teachers are retiring earlier.

Because of that amendment in 1987, what effect would that have on the original agreement that the teachers signed when they entered the profession? Would it go as a natural change or evolution in the pension plan or would they still be stuck with the original survivors' benefits law the way it worked then?

Ms. Morrison: I am not sure I understand your question, Mr. Campbell. The rules of the pension plan do change from time to time, and the way in which they change will depend upon the nature of the amendment. Some amendments are retroactive and some amendments are prospective; so depending on the nature of a particular change in the plan, it will affect people in a particular way or not. For example, the amendment to the Legislative Assembly's pension plan was made in 1984 and was made retroactive to 1977. That affected a certain group of people; it did not affect people before that. But I think your question would relate to a specific piece of legislation.

Mr. Campbell: No. I am asking you because you are the Ombudsman. You people deal with these cases all the time and I am trying to get it clear in my own mind. The general comment you had made last was that you brought to our attention that the teachers had done certain things when they entered the profession: namely, they worked out a pension plan at that time, as I understood you.

Ms. Morrison: No. The point I was trying to make was that the pension plan does not depend at all on his status when he enters. He pays in a certain percentage; the payments are not determined by the fact that he is married or single or by whether he has children or does not have children. The only reason I was trying to clarify that is that some of you may have read through all of these materials and seen in some of the responses some reference to the original contract, as was set out in one of these letters, and essentially I was trying to provide you with information that there is not such a thing as an original contract except to the extent that all teachers pay in.

Mr. Campbell: Right. OK, you have answered my question. Thank you.

Madam Chairman: Mr. Campbell, are you finished for now?

Mr. Campbell: Yes.

Mr. Henderson: Thank you. I just had some general questions that

stem from my attempt to put my mind around this issue. If I see a patient who comes from Montreal to marry somebody in Ontario, if I see that person the day before he is married, he would not have coverage under the spouse's Ontario health insurance plan. If I saw that person the day after he was married, he would, I guess. Is that discrimination on the basis of the date of a marriage, and if not, why not? I am trying to understand; I am not a lawyer, and I am trying to understand within the language and the framing of this case how it is different.

Ms. Morrison: The spousal benefit in OHIP applies to all spouses, even to, say, common law spouses. There is a whole bunch of various definitions under which people can be entitled to OHIP spousal benefits.

Mr. Campbell: Right.

Ms. Morrison: They are intended to benefit spouses and they are not discriminatory on the basis of marriage, because that is what they are for: they are spousal benefits; just as here we are not arguing that a person who is not married is discriminated against because she is not married to Mr. H.

Mr. Henderson: But Mrs. H is not getting it on the grounds that she married him after, apparently.

Ms. Morrison: She is treated differently from other spouses by this plan.

Mr. Henderson: Just the same as my patient is treated differently because, say, she was treated the day before she married him instead of the day after. Is it not comparable in that sense?

Ms. Morrison: No, I do not believe so, because the purpose of this plan is to provide benefits for spouses of deceased teachers. What we are arguing is that she is being discriminated against with respect to other spouses of deceased teachers because she married Mr. H after he retired and they married their respective spouses before they retired.

Mr. Henderson: Let's come at it another way. Somebody could argue, it seems to me, that the whole superannuation idea rests on an implicit contract with the working teacher and the spouse of the working teacher and that where the spouse became a spouse after the work stopped, the implicit contract is invalid. Do you have any thoughts about that?

Ms. Morrison: I must say that that argument does not hold much attraction for me. One reason is this: if the person married Mr. H the day before he retired, that person would not have been involved in the implicit contract in any way, if by implicit contract you mean sort of contributing to their ability to be a teacher or whatever it might mean, but they would be entitled.

Mr. Henderson: But the only way to get around that would be to try to titrate the entitlement against the number of years of spousal relationship during which time the person worked, and that becomes bureaucratically horrendous. To keep it simple, I guess they just say, "We will just make it arbitrary and it is either before or after retirement."

Ms. Morrison: One of the reasons we have been given for this kind of a provision is to prevent what are called "death-bed marriages." That is, to make sure that some unsuspecting ex-teacher is not accosted on the street by

some young thing and tricked into marriage so that she or he would then take the benefit of the pension.

Myself, I feel that that is a highly unlikely scenario but even if it is a problem, we have also discussed with, as you will see in some of these materials, people at the pension commission and people in other provinces and they have provided us with examples of schemes which prevent that by doing exactly the sort of thing you just mentioned; that is, the closer to death the marriage date is, the less the entitlement to pension. So that protects the pension plan from having, say, a 20-year-old young man being entitled to a pension having married an 85-year-old woman and then having that pension for the rest of his life.

Mr. Henderson: The idea of a joint spousal entitlement to the pension is sort of in line with the philosophy that when people contribute to a relationship, regardless of whether the contribution is one that is usually recognized in monetary terms or not, there is a kind of a mutual shared entitlement to the benefits that have accrued during the time of the relationship, like family law I suppose, and what happens when families break up and so on.

That whole line of thinking too would run counter to the position of the Ombudsman, would it not? Because you are saying that it is not a matter of what you contribute, say, during a lifetime or even during a large period of time of a relationship. It is kind of a legalistic question of having been married even though the marriage occurred after the period of service for which the superannuation was in recognition of ended.

Ms. Morrison: I think the trend in family law which you allude to, in which there is an entitlement for people for having contributed to the relationship over a long period of time, was intended to add entitlement for people who would not otherwise be entitled because they were not "proper spouses," but the proper spouse still has entitlement in terms of the law; that is, that kind of trend arose when common-law spouses were not being entitled to benefits because they were not "proper spouses."

I do not think we are suggesting here that that whole trend is not a good one. What we are suggesting is that here we have a proper entitlement; that is, a spouse who ought to be entitled to this. I should also add that we spoke at fair length with the complainant, as you will see in the report, and decisions that they made about financial matters were to some extent determined by the fact that Mr. H thought she would be receiving this spousal allowance. He did not, for example, have mortgage insurance and he did not have other kinds of insurance—

Mr. Henderson: He probably could not have got any.

Ms. Morrison: —so, to some extent, decisions about their financial arrangements were based on the fact that he felt she would be entitled to the spousal allowance, which would have been about half his pension.

1410

Mr. Henderson: Has somebody worked out the cost implications of the change that the Ombudsman is recommending? Assuming it became a precedent—preferably not in absolute dollar terms, but in terms of percentages—what order of increase in cost would it be?

Ms. Morrison: We spoke to a Ministry of Government Services actuary,

and I think you might have some information about that in the final report. It was his view that this would really make very little difference; that is, it would have minimal effect. The reason he had that view is, as I understand it—and I do not know very much about pensions—the actuarial assumptions that are made in setting up the plan and deciding what the payments in and so on are, include an assumption which states that something like 90 per cent of people will take spousal benefits. I think that is the 90 per cent that I recall.

That is just an assumption. His view was that, if anything, this entitlement might bring the real figure closer to the assumption, which is high. The assumption is 90 per cent. It is purposely high. He felt, if anything, this would just edge the numbers towards that assumption. That was our information.

Madam Chairman: Just for the record, could you identify who is sitting beside you?

Ms. Morrison: Yes. Elaine Buckstein. I am sorry; I introduced her when I began.

Madam Chairman: We snoozed through that part.

Mr. Pollock: If I understood it correctly, you mentioned that the pension plans for the members of the Legislative Assembly have the same omission?

Ms. Morrison: Yes.

Mr. Pollock: And that it was corrected?

Ms. Morrison: Yes.

Mr. Pollock: And that it was even made retroactive to 1977?

Ms. Morrison: That is right.

Mr. Pollock: Was that done for any specific reason?

Ms. Morrison: Yes—well, it has a specific name. It is known as the "Robart's provision."

Mr. Pollock: I see. But it was not done to engulf any one particular person, or do you know that?

Ms. Morrison: It was made retroactive to 1977 for a particular reason, I believe, but it does correct this very problem in the Legislative Assembly retirement provisions.

Mr. Philip: When did John Robarts get married?

Madam Chairman: A lot of nodding.

Interjection: You would have to show a lot of heads going up and down.

Mr. Campbell: At the same time, just to be fair across party lines, I might point out that they took away some other provisions that allowed Mr.

Foulds, Mr. Martel and Mr. Gordon to retire with a very much different pension than future retirees will have. So they gaveth and they tooketh away in that sense between the two pension plans. I realize that comment is on the legislative one alone, but the superannuation changed as well.

Madam Chairman: Was that your question?

Mr. Campbell: It was a point of information.

Mr. Lupusella: I have a question. In presenting your case, you emphasized the issue of discrimination. I read very carefully the letter from the Attorney General to Dr. Hill stating that it is not a matter of discrimination because it emphasized the principle of date of marriage and nothing else. How can you reconcile those two principles, based on what we heard today?

Ms. Morrison: I think, as Mr. Bell pointed out when he was looking at the Attorney General's correspondence, our first letter to the Attorney General suggested that this was discrimination on the basis of marital status.

The response from the Attorney General was no, he did not agree with that; he did not agree that it was discrimination on the grounds of marital status but rather that it related only to the timing of the marriage, not marital status.

In our final report, at page 77, we responded to the Attorney General's concern about that and said that even if it were not discrimination on the basis of marital status per se, it was discrimination based on the basis of the timing of the marriage.

The Attorney General, in his final response to our report, noted that we said that but did not argue with it and did not say, "That is not an acceptable ground," or "That is not discrimination." He just noted that we had changed from arguing on the basis of marital status to arguing on the basis of timing of marriage, and he made no comment. Our conclusion from that is that he does not quarrel with that particular finding.

Mr. Lupusella: Taking the other aspect of your argument, that the date of marriage is contravening the Charter of Rights, are you still pursuing the same case on the same ground or is the ground going to change on the basis of the new premise?

Ms. Morrison: No. Our argument is that Mrs. H is discriminated against in relation to other spouses only on the basis of the fact that she married at a different time with respect to her husband's career than those spouses did with respect to their respective husbands.

Mr. Lupusella: But the superannuation act deals with the timing of marriage and nothing else. How can you picture the Charter of Rights into your presentation when, in fact, this particular section of the superannuation act does not breach the Charter of Rights?

Ms. Morrison: We argue that it does, that the particular section of the superannuation act is discriminatory; that is, it contravenes the Charter of Rights by discriminating against people like Mrs. H on the ground of the timing of her marriage, and that point was not argued by the Attorney General.

Mr. Philip: The point I think you are making, though, is that even

though she was married, she is being treated as being unmarried simply because of the timing, and that is the charter argument: that she is being treated as an unmarried person even though she was married and other married persons are covered under this.

Ms. Morrison: That is one way of arguing that marital status argument.

Mr. Philip: The charter argument.

Ms. Morrison: But I think in our final report we withdrew somewhat from the strict marital status argument and said that even if this is not discrimination on the basis of the unnamed ground, marital status, it is still discrimination.

Mr. Philip: It is still not fair.

Madam Chairman: Thank you, Mr. Philip.

Mr. Philip: The argument is in the documents. If the documents are fairly clear, you do not need to ask a lot of questions.

Madam Chairman: Thank you for the explanation. I was a bit concerned there.

Mr. Philip: I am not going into a state of depression, or my tongue has not been injured over the weekend.

Madam Chairman: Thank you, Mr. Philip. I was wondering there; we were a bit concerned.

Ms. Skelton, will you be speaking on behalf of the ministry?

Ms. Skelton: Yes.

Madam Chairman: Do you have any opening remarks or statements before we commence questions?

Ms. Skelton: I really have very little to add to what has been said. As was indicated by Ms. Morrison, the ministry has agreed that there is a potential problem here that needs further examination, that it is not a simple problem to address these normal provisions in pensions plus the charter issues, but that we would examine it with the other ministries involved in the issues with a view to amending the legislation if it proved necessary.

1420

Mr. Bell: Can I just expand on that a little more? Dr. Shapiro's letter to Dr. Hill, dated August 2, is at page 87 of that package of material that you have.

Ms. Skelton: Yes.

Mr. Bell: I will wait for you to get it.

Ms. Skelton: Yes, I have it.

Mr. Bell: Do you see, at the top of the second paragraph on the

first page, there is a record of an agreement among the parties to this prior meeting that the act appears to be unfair to the complainant?

Ms. Skelton: Yes.

Mr. Bell: I take it you concur in the view expressed by Ms. Morrison that at that meeting they zeroed in on the specific section that we have been talking about, whether it be the old act or the 1983 act?

Ms. Skelton: The specific provision being the one in the old act, yes.

Mr. Bell: All right. Is there a commitment within the ministry that this section, after review or whatever, will be amended to remove that restriction?

Ms. Skelton: No, I think that is going too far. I think it would depend upon the results of the investigation, taking into account everything that we looked at in relation to the Charter of Rights issues that have been raised and the validity of those, as well as normal pension principles.

Mr. Bell: Then the basis of the ministry's position is more than just money, more than just how much this is going to cost?

Ms. Skelton: Yes.

Mr. Bell: In that regard, has there been any assessment or actuarial calculations undertaken to assess the degree of impact such legislation would have on the fund?

Ms. Skelton: We have looked at it very roughly, because it is very difficult to pin down the actual numbers of people involved, for the reasons that were raised earlier, and our guess is that it is somewhere in the region of \$10 million.

Mr. Bell: Over what period of time?

Ms. Skelton: That would be simply to deal with the retroactivity issue for the people out there.

Mr. Bell: That is the current—

Ms. Skelton: That is for the existing people in Mrs. H's situation.

Mr. Bell: The current potential entitlement.

Ms. Skelton: That is right.

Mr. Bell: It does nothing as to the entitlement in the future should people have the same circumstances.

Ms. Skelton: That is right.

Madam Chairman: Ms. Skelton, did you ever disclose this amount that you have arrived at to the Ombudsman's office?

Ms. Skelton: We did not arrive at it until we came up with it on Friday, finally, in terms of coming out with an estimate based on what that will cost.

Mr. Bell: You have my apologies. It was my question that brought it out.

Madam Chairman: The only concern we have, while I found that a very interesting amount and I think it is critical in some ways to the case, is that we have to be cautious about anything you have determined that is not in writing before us that, before coming here, you could have mentioned to the Ombudsman's office, either in writing or—realizing that this case has been put over for almost two weeks now—verbally. If a question is going to elicit some kind of information like that, I think we should be somewhat cautious.

Mr. Bell: You mentioned that part of the review you would like to see happen includes a consideration of 15(1) of the charter, whether the legislation does in fact offend.

Ms. Skelton: Yes.

Mr. Bell: Do I take it from that that the ministry has not yet taken a final position on whether or not the section does offend the charter?

Ms. Skelton: That is right.

Mr. Bell: That is notwithstanding the communications passing between the Attorney General and the Ombudsman and the Minister of Education, as the case may be?

Ms. Skelton: That is right.

Mr. Bell: Do you have anything further to add to assist the committee?

Ms. Skelton: No, I do not think so. I think the facts of the case have been put before you.

Mr. Bell: I have no further questions.

Mr. Elliot: I would like to address a question to the Ombudsman, if I may. I am a little concerned with respect to this particular case because I am a person with a fair bit of background in this particular area, it has always been my premise that we are not really talking about benefits in the ordinary sense of the word when we are talking about pensions. It is actually an insurance scheme and the amount of payout should be directly dependent upon the amount of pay-in. The type of assumptions you are talking about, that an actuary would make in coming up with some figures, would certainly include the early death of some spouses in the scheme of things.

With respect to making a recommendation like changing the regulations to accommodate this particular complaint, what bothers me is that those of us conversant with pension legislation know the present changes have been such that, actuarially, if I want my wife, for example, to get 75 per cent instead of 50 per cent of my pension on my death, I take quite a substantial cut in the payouts to pay for that.

I am wondering with respect to your proposal on regulation change how that kind of philosophy could be incorporated into a situation such as this. If you are talking about a straight benefit, which are the words that have been used fairly consistently throughout, as opposed to somehow paying down

the pension that could have been paid because the person is already deceased, that kind of thing would be very difficult to do.

I am feeling very uncomfortable about the basic insurance philosophy that I think pensions should be based upon, because of the arguments I have heard from the Ombudsman in this particular case. I would like you to expand on how you anticipate paying the shot for this kind of complaint.

Ms. Morrison: As you can see from our report, we were concerned about that. We were concerned that one of the arguments against our recommendation might be that it was too costly to do this. We therefore did consult an actuary for his view of how the pension assumptions, the actuarial assumptions would be affected by such a change, and he felt the effect would not be large.

We have not had, to date, a complaint about the provision you speak of, the provision of electing for a second spouse and taking an actuarial reduction in the pension. We have not considered and investigated that particular provision, but we do comment on it in the report and say that we have some concerns about that provision as well.

We have not been provided with information by anyone that this would be a costly change. The \$10-million figure you just heard was never provided to us. Frankly, I would like to see the calculation, because there are a number of things that affect this sort of calculation. Divorce rates, for example, are way up compared to what they were. If the actuarial assumption has changed given the changing divorce rates, that would affect the fund quite the other way; that is, if people do not have a spouse who is entitled, because of increased divorce rates, then that would be another change to the assumptions you would use to set up such a fund.

In our investigations, especially an investigation of this type, we are always concerned to try to find out the effect of such a recommendation. If you look, for example, at page 72 of your materials, you will see that we went to a Mr. C, director of actuarial services, the Ministry of Government Services, and tried to find out more about the consequences of such an amendment. He provided us with the information that I spoke of a few minutes ago, about the 90 per cent assumption.

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He did not feel that the costs involved in this particular recommendation would be high. Certainly, if that were to be a good reason for not implementing a recommendation, the Ombudsman would require some detailed information to provide him with a substantiated claim that the cost would be \$10 million. We do not, when we get a response from a ministry, just take the ministry's word for a statement of that sort. We never received any indication that the reason the recommendation could not be implemented was that it was too costly. I do not think you will find that in any of the responses.

Mr. Elliot: I wonder if the ministry would like to comment on that last observation, because of paramount concern to me is the cost of this.

Mr. Philip: You are presenting us with new information, and I do not think the committee can with new information make a recommendation at this point in time. It is contrary to the rules.

Mr. Elliot: What I am asking is, why did the ministry not communicate this cost to the Ombudsman? I am not asking about the information.

Ms. Skelton: We did not have a cost. I did qualify it with Mr. Bell and say it is an extremely rough estimate. When you look at a number like that, which is extremely large, in isolation, it depends on what you compare it with. The teachers' superannuation fund is also extremely large.

Mr. Philip: I have some questions of the ministry. One of the things that puzzles me is the letter of the Attorney General; I am referring to his letter of July 28. It puzzles me that he would respond to Dr. Hill's letter of July 7, but to only to one of the arguments. Essentially, he says, "Well, yes, I have an extra argument, but I still hold my first position," but then does not deal with the second reason as to why there is a basic unfairness. Do you have any idea why the Attorney General would not respond, or can I take it that the silence is in effect agreement with the Ombudsman's argument 2?

Ms. Skelton: I do not know.

Mr. Philip: Since the ministry would have been in receipt of the letter from the Attorney General, and since the ministry would have been aware that the Attorney General responded to only half the arguments, did you make any attempt subsequent to the response by the Attorney General to deal with argument 2?

Ms. Skelton: At this stage, no, we have not.

Mr. Philip: Can one assume then, from your silence, that you either agreed with argument 2 or that you chose not to respond to it because you felt that perhaps your argument might not be as strong or you might not have an argument to 2?

Ms. Skelton: I do not think you can. I think we would still have to take those arguments into consideration and go a lot further into them. We do not have the expertise in the ministry to address discrimination grounds of legislation. We would have to work very closely with the Attorney General to come up with that.

Mr. Philip: All right; so you are saying that you do not have it within the ministry to deal with discrimination. When you say "discrimination," you are not dealing with the more technical charter argument, but discrimination per se; in other words, with argument 2.

Ms. Skelton: Argument 2. Under the Ombudsman Act, I and the ministry would take the advice of the Attorney General's ministry on how that related to the case.

Mr. Philip: Now, you knew that you were appearing before the committee. In the three weeks that you have had to prepare this case before your appearance, between July 28, when you would have recognized that the Attorney General responded to only half the arguments in the July 7 letter to the Ombudsman, and now, what action have you taken to get an opinion on argument 2 by the Ombudsman?

Ms. Skelton: We had asked for more detailed information from the Attorney General.

Mr. Philip: Can you point to written letters outlining your request

for more detailed information as a result of what you might consider the vacancies or the omissions in his July 28 letter?

Ms. Skelton: No; it is not in the material you have here.

Mr. Philip: Did you write to him? Is there correspondence?

Ms. Skelton: Telephone calls; not correspondence.

Mr. Philip: Can you tell us who would have called and when? Would there be notes or documentation of any such phone calls?

Ms. Skelton: I do not know. Our legislation branch would have made the phone calls.

Mr. Philip: I wonder if I can back up then to page 74 of our notes. I just want to make sure I understood your response to our legal counsel. On page 74 it says: "On May 9, 1988, an interim response was received from the Minister of Education, the Honourable Chris Ward. The minister advised that he had requested a legal opinion on the matter from the constitutional law section of the Ministry of the Attorney General." I take it that legal opinion was on the charter matter and not on any other matter.

Ms. Skelton: That is right.

Mr. Philip: "By letter dated May 25...." Do I take it then that the letter of the Attorney General of July 28 was what the response was from the Ministry of Education's point of view on this matter, that this would have been the—you see, he says the words "constitutional law section"; it does not say—a page—and-change letter from the Attorney General saying, "I am still of the same opinion."

In fact, a new argument was made on the constitutional issue in the July 7 letter that was not addressed, and in addition, a second reason was given that the Attorney General completely ignores. He does not even address it. On the first argument he says, "I am still of my first opinion," and he does not give any arguments as to why the new argument on the constitutional issue of discrimination is not addressed. He simply says, "I still think you are wrong." Then on the second one, he ignores it.

What further legal opinions have you obtained on the constitutional matter, after that of May 9, other than simply the Attorney General saying, "Well, here is where I stand."

Ms. Skelton: That is what we have, the Attorney General saying—

Mr. Philip: So you have your May 9 interim response. You have the Attorney General's opinion, which does not really give us very much to go on as to whom he has consulted or any cases he is citing for his opinion, if any exist.

Then you have the counter-response by the Ombudsman, with an additional charter argument and another reason, and in all of this, you have not obtained any further legal opinions as to whether or not the Ombudsman's arguments may either be correct on the charter matter or be correct on the second matter, which is a matter of discrimination.

Ms. Skelton: No, we do not have that.

Mr. Philip: It just strikes me that if you were of the opinion that you were right, the reasonable thing to do would have been at least to ask for evidence. I do not see any evidence that you have been able to present here. There may be evidence out there if you did go to the trouble of getting the arguments, but I do not have any evidence before me that suggests or that even attempts to contradict the revised charter argument in the July 7 letter or the additional discrimination argument in the July 7 letter. Do you see any evidence in the documentation here before me to contradict either of those arguments in the July 7 letter?

Ms. Skelton: No.

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Mr. Philip: Can one conclude that since I have only one set of arguments with no counter-arguments, the reasonable thing would be for me to conclude that either you do not have a case, or second, if you had a case, you would at least try to get some arguments, and that you have not done it, and therefore, in the absence of any case on your side, I should conclude in favour of the Ombudsman? Can you give me any argument why I should not think that way?

Ms. Skelton: Our feeling in the ministry is that we have not had adequate investigation of the issue in relation to pensions to respond on those particular issues as yet. There is a lot of contradictory information about it.

Mr. Philip: I could accept that argument if you had come to the committee and said: "This is a complicated issue. We are seeking legal opinions. Here's who we are consulting. We have asked an opinion," of this constitutional lawyer or that constitutional lawyer, or, "We have asked the Attorney General to obtain a constitutional opinion," or, "We have asked them to send the test question to court to be tested as a question."

But you have not done any of that and you had time to do it, at least in terms of asking for that. You could have come to the committee then and asked for a delay, saying: "We are in a position where we simply do not know. We have asked for a legal opinion and here's how we have approached it," but you have not done that.

Mr. Campbell: In the letter on page 86 of our package from your deputy minister to Dr. Hill, you mention, "The Ministry of Education is supportive of the need for a review of the act and for consideration of statutory amendments," etc. I take it that when you say "a review" you are not specifically starting up a whole review process just for this one case, that you are looking at the whole act. Could I conclude that is possibly the case?

Ms. Skelton: We would have to go through a review process for this one item. As it happens, there will be another review ongoing. At the same time, this one item would have to be looked at in a number of different ways than a normal review process of the act.

Mr. Campbell: In reviewing this act, the process would be that the Ministry of Education, in consultation with other ministries, would conduct the review. Is that a fair statement?

Ms. Skelton: Yes, and in consultation with the Ontario Teachers' Federation.

Mr. Campbell: If the Ontario Teachers' Federation supported such a view, for example in this case, that certain amendments be made—I am not asking you to speak for the ministry, obviously, but just perhaps an opinion so I can understand how the process works—when you are talking about review, normally it is just the interior group that is making the decisions, not an outside body, even though it is affected.

Further on in your letter, it says. "This item will be raised with the OTF as soon as possible, both informally by telephone, and formally, at a scheduled September meeting." Your ministry is planning to do that.

Ms. Skelton: Yes.

Mr. Campbell: Do you have an idea of what kinds of issues would be raised with OTF, not only that one issue but is it normal that other issues, such as other contentious issues within a pension plan, are raised with OTF and your ministry?

Ms. Skelton: We have an agreement that changes involving policy changes to the Teachers' Superannuation Act are always reviewed with the Ontario Teachers' Federation before they take place.

Mr. Campbell: Who is ultimately responsible for the superannuation act? Who has the power to enforce provisions of the act, the regulations? Is it the superannuation commission by itself or the Ministry of Education, ultimately?

Ms. Skelton: In terms of policy and policy change to the legislation, the Ministry of Education is responsible for the act. In terms of its implementation, it is the responsibility of the Teachers' Superannuation Commission.

Mr. Campbell: If someone is disobeying the Teachers' Superannuation Act, who has the power to tell them—

Ms. Skelton: The commission.

Mr. Campbell: Does the Minister of Education have the power to say, "Look, conform to the act" or not?

Ms. Skelton: Yes.

Mr. Campbell: OK. I guess the situation, then, is that the ultimate authority is the Minister of Education and if the Teachers' Superannuation Act is not being followed by the Teachers' Superannuation Commission, then the minister can order it to conform?

Ms. Skelton: Yes.

Mr. Campbell: If a person retires and has started action with the commission, what force in effect does the case have? Can it be made retroactive, in your opinion?

Ms. Skelton: I do not know that I can speak to that in a general way.

Mr. Campbell: OK. Specifically in this case we are dealing with, if a decision was made and it became law and it became a change in the legislation, because this case started before the act was made provisional, is there any provision for that person to be looked after?

Ms. Skelton: I will let Dan follow me. I would say you would provide for that in your legislative change.

Mr. Campbell: In other words, retroactivity.

Ms. Skelton: Yes.

Mr. McArthur: Yes, that is the route in this instance because, as has been commented earlier by representatives of the Ombudsman, the Ombudsman found the commission was behaving according to the act but that the act affected this particular applicant in this way. The commission throughout feels bound by the act and if it is to act in any alternative fashion, it would seek a change in the act before it would do so. But a retroactive change in the act is possible.

Mr. Campbell: If I hear you correctly, if it were not provided in the legislation that it will be retroactive to 1982, this person is out of luck.

Mr. McArthur: Yes. I understand that to be the position of the Ombudsman's recommendations 3 and 4 or one of those last few, that if you do not look after the retroactivity aspect of this person's situation, the commission will be bound not to set her situation right. Indeed, that is the substance of the bridge between recommendations 2 and 3, if I understand those four recommendations in their entirety.

Mr. Campbell: So the applicant is in the position that if retroactivity is not part of the legislation, she has won the battle but lost the war.

Mr. McArthur: That is my understanding.

Ms. Morrison: Unless the ex gratia payments recommended in recommendation 3 and 4 are implemented.

Mr. Campbell: I appreciate that. When you are talking about an ex gratia payment, if my understanding is correct, that is where we recognize a problem exists, but it is not a real pension in that they are not getting their entitlement; they are just getting a payment of very limited duration to right a wrong.

Ms. Morrison: Our recommendation is that the ex gratia payment be in place of what would have been the entitlement had the amendment been retroactive to the date of her application.

Mr. Campbell: In the questioning from Mr. Bell, I think the answer was that a number of things you are dealing with might be under review. Have you had any other cases to the Ombudsman of alleged discrimination that have come to your attention that might be part of this review by your ministry?

Ms. Skelton: Not that I can think of. We keep a running list of what we would call problems with the act to be looked at, at any time it is opened.

Mr. Campbell: Am I right in saying what I said earlier about the retirement pension plan being substantially a window effect put in to allow teachers to have a 35-and-out option until August 1989 and retirement at any age having taught one or more days in each of 35 school years until 1990?

Mr. McArthur: That is a valid statement.

Mr. Campbell: Would this review take into account that there will be a number of teachers in a position to, say, buy back their pension plans? Would there be a provision that you would look at in light of this new window being closed in 1990 that people who can buy back pension plans doing the same job as people who cannot buy pension plans would be part of your review? In other words, has it been the custom in the past when these things have happened that those reviews have happened and those kinds of anomalies straightened out?

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Ms. Skelton: Those sorts of issues which would be changes in the provision of the plan to improve the benefits for a number of people would normally be brought forward to a review by the Ontario Teachers' Federation.

Mr. Campbell: But those that are trying to correct anomalies: people who are doing the same job, entering the profession at the same time, with the same background, with pension plans that one can buy back because of the time he started, the other cannot; exactly the same job, same situation.

Ms. Skelton: It is awfully difficult to know if you really are talking about the same circumstance in that sort of example. Obviously, if there are problems, we take a look at them, but only too often things are not as similar as they appear on the surface.

Mr. Campbell: Thank you. That is all I have. I just note in closing that with this provision, the number of teachers who are in fact in those discriminatory kinds of things, it is going to be a busy year for the Ombudsman, I would suspect, to try to get it here before 1990 to allow those teachers to take their entitlement. That is all I have to say.

Mr. McCague: The cost of doing this provision would seem to be small compared to that of some of the other amendments that I know are before you. It seems to me that the commission or the ministry might have presumed that Mr. H might have died before whichever wife it might have been—one, two or three—and that you would have had to pay her benefits for, again, some actuarially determined length of time. I am not sure how old Mr. H was, but he was a pretty stalwart guy.

With the introduction of the Family Law Reform Act, which does in some way recognize the kinds of things that you are not quite so happy about in the ministry, it would seem to me that on compassionate grounds you might have extended to Mrs. H the benefit from which she seeks to benefit.

Do you acknowledge that extending this benefit to her would be very little in monetary terms?

Ms. Skelton: In terms of the pension fund it is very small, yes.

Mr. McCague: OK. This is the kind of question I guess I would have asked you three or four years ago when we were working in the same office. Do

you acknowledge that you are looking at it within the terms of reference that you have as of this point, and not at this particular case?

Ms. Skelton: I am not quite certain what you are getting at there. If you say you are looking at the principle on the pension, not just at the individual case, the answer would be yes.

Mr. McCague: So you are looking at your legislation and your regulations and not particularly at this case.

Ms. Skelton: Yes, not at the individual case, because you cannot assume that there is only one individual case.

Mr. McCague: From that leads the question, have you ever found it prudent to advance benefits on that compassionate ground before?

Ms. Skelton: Not to my knowledge. I do not know.

Madam Chairman: Mr. McArthur, would you be aware of any moneys advanced because of compassionate grounds?

Mr. McArthur: Not on the grounds of compassion in the sense of what this case speaks to. Certainly the commission, from time to time, where a teacher cannot get his papers and his credit in order by the time of retirement, will advance moneys while the teacher gets his house in order, so to speak. I do not understand that to be the nature of the advance question that was asked; rather, it was related to compassionate reasons, and compassion enters into the commission's mind only in the examples I cited in that people have to live on something, but not in the instance where this individual is on compassionate grounds for the rather substantial reasons given by the Ombudsman.

Mr. McCague: Just to come back to that, have you felt it prudent to extend benefits on compassionate grounds in whatever way you define compassion?

Mr. McArthur: No, and as a matter of fact, when you mentioned the word "prudent," because you are dealing with, in this instance, 32,300 pensioners and 140,000 contributors currently active and 250,000 inactive contributors and compassion on a case-by-case basis does not lead to good service for the large group, when you qualify it by the word "prudent," I have to say no. But there are instances, and I underscore the fact we are only talking about advances on moneys that these people have a clear right to under our act and they are missing a piece of paper or a letter from Quebec to transfer their credit. We are not talking about people to whom the commission on several occasions has concluded the act denies rights. We have, to the best of my knowledge, not made any payments in that frame and context of compassion.

Mr. McCague: In every case, you have denied rights to a spouse or a widow because of marriage after retirement date.

Mr. McArthur: I get really nervous when somebody uses the word "every." I have been with the commission for five years and I can state that categorically. There are categories of survivor pensions that I am not even familiar with because they were offered in the late 1940s or the early 1950s, and I think we even have one or two of these people still alive. I honestly do not know the conditions under which those survivor pensions were granted.

Mr. McCague: You are not telling us that the case of Mrs. H is

wrong, you are just telling us you cannot do it by your legislation or regulation.

Mr. McArthur: That is correct.

Madam Chairman: Could I ask what the size of the fund is?

Mr. McArthur: As of the last statement, it was approximately \$11.5 billion.

Madam Chairman: I have heard tell of a surplus. I know there is some question of who owns the surplus, but is there a surplus in the fund right now that is recognizable?

Mr. McArthur: In the main fund, the one we are here discussing, it is in the magnitude of \$450 million. There is, however, a side fund which has been the subject of substantial review which has a substantial deficit.

Ms. Skelton: If you were going to consider a pension with no indexing attached, there would be a surplus, but if you were going to consider someone to be entitled to whatever it was indexed to, then there is a substantial deficit.

Madam Chairman: Do we know how much that is? I know that is combining all those reports together, but is it going to run out? What is the deficit?

Ms. Skelton: It is between \$4 billion and \$5 billion.

Madam Chairman: I have one more question before I go to Mr. Philip. Just to understand the fund, if someone retires at 30 years of age, he may have had 12 years of service if he were in the old system. Is he entitled to his retirement payment immediately on retiring?

Ms. Skelton: At 30 years of age?

Madam Chairman: That is right.

Ms. Skelton: No.

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Madam Chairman: They have to accumulate that magic 90 number? Is that right?

Ms. Skelton: At 30 years of age?

Madam Chairman: That is right.

Ms. Skelton: No.

Madam Chairman: But they have to accumulate that magic 90 number, is that right? Years of service—

Ms. Skelton: You need to have reached normal retirement age, which in our fund is 65, or take a reduction for each year in advance of that that you collect a pension.

Madam Chairman: How early can you take the reduction? Does it go down to 55, 50?

Ms. Skelton: To 55.

Madam Chairman: So someone can theoretically qualify for a pension and retire at 40 or 50 and maybe not start taking the retirement fund?

Ms. Skelton: They could leave teaching but not yet take a pension. They would not be eligible to take a pension until they were 55, and then it would be a reduced one.

Madam Chairman: This whole question does not trigger at all after someone has started taking the retirement fund; it is a question of when he retired and when he got married. What I am saying is, if they retire at 55 and are not eligible to take retirement funds or pension until 55, and they got married at 52 and died before 55, would the spouse be eligible for taking any kind of retirement fund?

Mr. McArthur: Retrospectively, our act—and this has come out in this case—lumps people who did not teach on or after September 1, 1984, into the old act, and this is the case before you. Mr. H taught under the old act, retiring, I believe, somewhere in the early 1970s, in 1972; so he was under the old act. The spousal entitlement is pivotal on his spouse of fact on the date of his last day of teaching, and that would be the treatment for all people prior to September 1, 1984.

Subsequent to September 1, 1984, people can acquire a spouse in retirement if they have retired subsequent to September 1, 1984. They must notify the commission within 90 days or subject themselves to a medical examination. In either event, if successful—

Mr. Philip: Who, the spouse or the retiree?

Mr. McArthur: The retiree. If successful, the teacher retiree's pension will be reduced until his death, and then the benefit will flow to the spouse.

I was muttering to Ms. Skelton that when you tried to tie it down as to the date of acquiring the spouse, there is a further complexity to the case, that the Pension Benefits Act starts to intervene. Whereas the teachers' plan has historically and still states that it is the spouse at the time of retirement, the PBA puts a little different twist on it and says it is the spouse at the time of the first payment. That, of course, has a great bearing on the scenario you were describing, because someone could leave at the age of 40, not take a first payment until the age of 55 and the PBA would require us to look at the spouse on the date of the first payment. We are still struggling with that, quite frankly.

Madam Chairman: OK. I guess my question was just to see how broadly this kind of recommendation would affect—I was concerned about that scenario.

Mr. Bell: Absent that last complexity, I am not sure I will ever understand.

In terms of impact again, because of the 1984 amendment, the election in

that amendment either by time or on medical examination, this situation is not likely to happen again, is it?

Take the circumstances of Mr. H. If Mr. H was aware that there was an election provision that applied to him after remarriage, he would likely either exercise that election or come to the commission late with a medical certificate. I think, from what you have told us, that as long as the person is determined by the medical examination to be physically and mentally competent, the extension will be granted by the late election; so we will not have this situation again.

Ms. Skelton: That is right.

Mr. Bell: So when we look at the impact, we are looking, in relative terms, at a fixed group.

Ms. Skelton: Yes.

Mr. Bell: OK. All right, that is helpful to the committee. Thank you.

Mr. Campbell: A supplementary to your question: Theoretically, retiring under 55 is not likely, but because of this window or this provision teachers could technically retire at any age. It does not specify what age. Teachers who have taught one or more days in each of 35 school years would have to be at least 45 to 50. Is that kind of vision not correct?

Mr. McArthur: I am not certain that it is correct. The benefit is payable no earlier than age 55 unless you have 90 points; and the people who are seeking the window and the people who are seeking the 35-and-out option, one which expires in 1989 and the second in 1990, do not have the 90 factor. Their benefits are not payable before the age of 55.

Mr. Campbell: If I might, this comes right out of the Teachers' Superannuation Act. I am quoting right from it: "teachers at any age." Is the commission not saying what you are saying, or what?

Mr. McArthur: It would be helpful to identify the document. It is the annual report of the commission, and it is not the act. In all cases we have to defer to the act and, as one can appreciate, that document is written for people to understand the benefits in general terms but is not the definitive statement on the benefits.

Mr. Campbell: It is certainly a document that every teacher in Ontario receives, and I would think you would take that back to the superannuation commission; it is misleading its own membership if what you say is true. I read it to be, and you said it was correct earlier, when I asked you before and when I quoted it. That is why I gave the supplementary to the chair to deal with.

Now, I am concerned if quasi-ministry documents are going out and they are misleading the people who are supposed to be getting them, because I read that. I do not have Hansard to read back, but you certainly said I was correct. Now you are saying I am not correct. Which is it? I am sorry I do not know your name. What is the situation here?

Mr. McArthur: My name is Dan McArthur.

Mr. Campbell: Thank you.

Mr. McArthur: The situation to which I responded earlier was the general reading material from that document. It does not go on to say in that document the earliest possible date for payment of those benefits. I will certainly undertake to report back the concerns of Mr. Campbell to the commission.

Madam Chairman: Thank you. I just wanted to identify that Mr. McArthur is the director of the Teachers' Superannuation Commission, for the benefit of the committee.

Mr. Philip: Mr. McArthur, I was puzzled by one of your responses, if I understood it correctly, to Mr. McCague. Did I hear you correctly saying that you did not have any provision under the present act, as revised, to make an ex gratia payment in the case of Mrs. H? Is that correct?

Mr. McArthur: This is my understanding, yes.

Mr. Philip: I am not a lawyer. I am just trying to read through the act, and you are much more familiar with it than I am, so maybe you can help me with this. When I look at paragraph 29 of section 63, it says that the Lieutenant Governor in Council may make regulations. It describes them all and it gets down to paragraph 29: "respecting any matter necessary or advisable to carry out effectively the intent and purpose of this act."

It strikes me that while other acts usually try to spell out the intent and purpose, one can assume that the intent and purpose of this act is to provide pensions to retirees who were at one time teachers or worked within the education system in Ontario—or those with whom we have reciprocity, etc., and who are now living in Ontario—and their spouses.

Here we have a situation where a spouse is a spouse but is not a spouse in this particular case for purposes of payment. Would you not agree that you would have the right, through an order in council, under this paragraph 29 of section 63, in fact to make an ex gratia payment to Mrs. H if you so deemed or if the government so decided, without any kind of amendment to the act? Would that be possible?

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Mr. McArthur: If I may respond, it may well be that it is not clear to all what is the relationship between the Teachers' Superannuation Commission, the Minister of Education and the Ontario government. The commission is a body established by the Teachers' Superannuation Act, which is made up of five elected teacher representatives and five government-appointed representatives. Their duty is found in section 59 of the act. It reads: "It is the duty of the commission to manage the affairs of the commission, to administer this act and to advise the minister on matters related to the affairs of the commission or the administration of this act."

When this case and its potential findings were made known by the Ombudsman to the commission, it did take it upon itself to write to the minister, and that is part of the record. The commission is not granted the powers to make regulations or to make act amendments, but rather that has been the prerogative of the minister through processes you would know better than I. Consequently, the commission, in reporting the matter to the minister, felt that it had carried out its duties, and the remainder of the facts, as you

know them, are before you. So the commission has not seen itself as having the power of Lieutenant Governor in Council, but rather the minister.

Mr. Philip: I understand that. You have the power to advise. I guess the idea has been left that somehow, in order to pay Mrs. H, you would have to have a change in legislation. What I am suggesting is that you have the power, as I read the act, to advise the minister that in your opinion, with respect to carrying out the intent and purpose of this act, an ex gratia payment could be made by an order in council, quoting the last paragraph 29 of section 63. Could you not?

Mr. McArthur: I, regretfully, cannot respond in an informed way to that because I would defer to my own solicitor, but we have made it clear in our correspondence that upon the direction of the minister, we will carry out his directives. His directive could well entail the action which has been described, but I am not informed well enough to respond to that question directly.

Mr. Philip: I am not a lawyer either; I am just trying to read English. Under one section of the act, you have the power to advise, and I assume that you advise on any matter related to the superannuation act. You can advise in the case of Mrs. H that Mrs. H was dealt with unfairly, in your opinion, if you so desire. Under the last paragraph 29 of section 63, it seems to me that you have the power that had you advised that an ex gratia payment might be made in order to carry out the intent of this act—the intent being to pay fairly retirees and their spouses—without any kind of legislation, the Ministry of Education could use paragraph 29 of section 63 and simply pay the woman. Could I ask Mr. Zacks or someone to give an opinion on that?

Ms. Morrison: You are reading from the Revised Statutes of Ontario 1980?

Mr. Philip: The latest one, am I not? Yes, 1980.

Ms. Morrison: I have the Teachers' Superannuation Amendment Act of 1983, and that particular regulation ability does not appear. I have not studied the regulations carefully enough to know whether I just may be missing it.

Mr. Philip: It is directly in the act, but it is under the description of where they can make regulations. You are saying that in the revised act it does not give—

Ms. Morrison: There is a section which says, "Prescribing any matter required or authorized by this act to be or referred to in this act as prescribed by the regulations." That is the closest.

Mr. Philip: So there is no indication there of the intent.

Ms. Morrison: I cannot find one.

Mr. Zacks: It seems to be amended.

Mr. Philip: When this case was first brought forward, though, would the original act not have been in place at that time?

Ms. Morrison: This is 1983.

Mr. McArthur: Was it brought forward in 1983?

Ms. Morrison: No. The amendments are 1983-86.

Mr. McArthur: In 1983. It was brought forward in mid-1985.

Mr. Philip: So you cannot be covered under the old act either. It was a great idea.

Madam Chairman: Could we ask you, Ms. Morrison, to make any closing comments at this time and then we will open it up for final questions from the committee?

Ms. Morrison: I think the facts of this case are very easy. The law is not without difficulty, but I think, given the questions that I have heard from the committee, there is no one in the room who does not understand the basis of the Ombudsman's recommendation in this case.

We have here a situation in which Mrs. H is denied her survivor's benefit under her husband's pension by virtue of the fact that she was married to her husband after his retirement. It is the Ombudsman's view that it is an unfair denial, a denial in accordance with a provision of an act which is contrary to the charter, improperly discriminatory or both.

It is also the Ombudsman's view—and I should say that I think we have agreement from the ministry—that the provision of the act is unfair to Mrs. H. I read the last letter in response to our report as agreeing that this provision is unfair. The question that we are then left with is the remedy.

You have heard from the ministry spokespersons that they have some legal concerns with amending the act and that they wish to consult with the Attorney General, the teachers' federation and a number of other people, which we can understand to be true. I think we do not, however, agree that they have not had an opportunity to consider these questions. Our subsection 19(3) letter on this matter went to the ministry on February 26, 1988. If there was a necessity for a consultation on the legal questions and a more generally thorough review of what I felt to be a very thorough subsection 19(3) letter, and again a very thorough final report on the matter, there was plenty of time for this to be considered.

When this matter came to be set up for the committee for early August, again it was put over for a couple of weeks, and again there was no further consideration or information that resulted from that. We feel that the ministry has had the opportunity to consider these questions and, in the end, that its final response to the Ombudsman agreed in principle with the unfairness of this particular section towards Mrs. H.

We then feel that the Ombudsman's recommendation that this be rectified ought to be implemented. It is fine for people to consider and consult and think about amending this act so that some future people may take the benefit of the amendment. Mrs. H is very old and very infirm. She will not last until an amendment to this act can be put forward. We feel strongly that Mrs. H ought to get the benefit of the Ombudsman's recommendation. We have, therefore, made alternative recommendations that would provide for an ex gratia payment by the ministry to Mrs. H in the amount of her entitlement. I might add that if the ministry were paying Mrs. H pending amendment of the legislation, it might have some incentive to hurry the amendment along.

In summary, we feel that there are good grounds for supporting this case, that the ministry has provided very little in the way of any information, which would suggest that it is either too expensive, too difficult, unfair or not legally possible to implement the recommendation, and we would ask the committee to support the Ombudsman's conclusions and recommendations in this matter.

Madam Chairman: Are there any questions from the committee? I have a couple. My first one is my concern with section 15, the charter argument. I recognize that the Ombudsman has this power to address the Charter of Rights, but I guess, as a person and as a politician, I never thought I would be making decisions on the charter; I thought that was left to judges and other people.

1520

My question is really to the ministry. What we have had occur in the last two weeks in the committee is that the Ombudsman's office has come before us with two separate cases, one with the Ministry of Health and one with yours, where it is addressing the section 15 argument. Although some of us have studied this charter profusely and probably too much over the last eight years, I feel somewhat uncomfortable making a decision on a section 15 charter right without some legal opinions other than the blatant one, which is that it appears discriminatory.

I am just concerned because the Ministry of Health, I would say, did not satisfactorily reply to this argument raised by the Ombudsman's office and it appears as though the Ministry of Education really has not directed its mind to it. You are still gathering information and you still want a response from the Attorney General.

What I am grappling with is that in the last two weeks I have had to try to make some decision on a section 15 Charter of Rights argument with really no response. My question is perhaps getting to the basis of why it has sort of been left to this last two weeks or three weeks or four weeks to try to get a legal opinion on it. I am sure many members of the committee are feeling somewhat uncomfortable with directing our minds to a section 15 argument, really without both sides of the argument before us or at least a firm legal opinion so that we can direct our minds to this particular issue which the Ombudsman has raised.

I guess my basis is that I am concerned why both your ministry and the Ministry of Health have not really directed their minds to it until this last stage and then we are sort of put in the position of not having something before us.

I guess I am trying to avoid this happening again. If the Ombudsman brings this up as an argument, I just do not know how we can circumvent the problem that we are finding ourselves in, which is that the Attorney General is looking at it and is doing so with many cases.

Ms. Skelton: From our perspective, I think what has happened in this case is that we thought we did have a clear answer from the Attorney General and then the arguments changed. Since then, we have not gotten back another clear answer on the new set of arguments.

If you are going to sit with these kinds of cases and look at arguments, I think you have to look at the full breadth of the issue. We would want to

look not just at what the Ombudsman had raised, but was there any possibility under that section? It is going to take a lot longer for the Attorney General to answer that for us.

Madam Chairman: You are looking at the July 7 letter, the 22(3) letter, where the two points were raised, I gather, the timing and the marriage—

Ms. Skelton: The marital status, yes. It raised a new set of questions that we had not addressed, in other words.

Madam Chairman: I would be a bit concerned that ministries just generally, as a policy, are taking the Ombudsman's bringing before us the section 15 argument as not a valid argument. I am just wondering how we can circumvent this the next time, and I guess that is just because we do try to respond. I know I personally feel uncomfortable with a section 15 charter argument without all the facts and legal opinions before us. I am having a little bit more difficulty with that.

The other question I had is to Mr. McArthur. If the minister made a directive or a direction to make an ex gratia payment to Mrs. H and he asked for funds to do this, would you be able to do that?

Mr. McArthur: Yes.

Madam Chairman: Does the minister in any way have the authority to make that decision or that directive currently, under the act as it is?

Mr. McArthur: I am not aware of the section.

Madam Chairman: Has he made a habit or any previous recommendations, directions, directives? Has he done this in the past? Can you point to anything that would be similar?

Mr. McArthur: The only one I can think of off the top of my head is that our act has not been amended to bring us into line with the Canada pension being entitled as early as age 60. The minister has advised us that he intends to introduce legislation to rectify that situation and has asked us to comply with it in the meantime, which we have done.

Madam Chairman: Are there any further questions from the committee? Does the ministry have any closing remarks?

Ms. Skelton: I guess finally I would simply say that although it seems lengthy, these issues of pension policy and charter policy are complex and a lot of them have not been tested, so the ministry is very genuine in saying it will look at its legislation and act on what appears to be the right course as a result of our investigation, taking into account the matters that the Ombudsman has brought before us.

Madam Chairman: Could you guess on a time line?

Ms. Skelton: I would say within the next six months to a year, taking into account having to actually come to the House with legislation.

Mr. Philip: Just by way of comment, I think it is interesting that the standing committee on regulations and private bills has set up for itself the right and indeed one of its duties and responsibilities to turn back

regulations which it considers to contravene section 15 of the charter. It is not only this committee that is having to judge.

Eventually, 15 years from now, if any of us are here around this table, we will have some case law to go by. In the meantime, you simply cannot stop making decisions and you simply cannot ignore section 15 of the charter. I think that is the position taken by the regulations committee and I think that we have to deal with it. We may be right and we may be wrong on some occasions, but you cannot wait 15 years for cases to come out. The committee in 15 years' time will probably be able to make better decisions, but until then we cannot simply stop making the decisions.

Madam Chairman: I think my point too, although I agree with yours, is that I thought I would have to be appointed as bench before I decided on these issues, other than arguing one side or the other. My only concern is that without all the apparent facts and legal arguments before us, even a judge will ask for those, and it makes it somewhat difficult. You may do anyway, but it makes it somewhat difficult; and this has occurred twice in the last two weeks, which is even more difficult.

Ms. Morrison: I should point out that in the Attorney General's letter of July 28, he states that he understands this matter is going to go before your committee. The Attorney General has a host of people who deal with section 15 on a daily basis who are very familiar with it and very able to give arguments if there are arguments to give. There is no argument given here, and the Attorney General knew this was coming before your committee, so I believe that what is in his letter must represent the best that can be put forward.

Madam Chairman: Seeing no further questions from the committee, I think we should adjourn in camera. The committee will try to make a decision on this and we ask that you keep yourselves available nearby. If it looks as if we will be able to come to a decision today, then we will inform you accordingly. Thank you.

The committee continued in camera at 3:30 p.m.

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Madam Chairman: Mr. McArthur, did you have something to clarify?

Mr. McArthur: Yes. It was drawn to my attention by my colleagues that I may have answered too quickly an exchange as to when benefits are available to teachers who leave the profession earlier than age 55. I made a rather categorical statement that benefits cannot be paid prior to age 55 unless they have 90 points. There is one other, and it happens to be one of the examples that Mr. Campbell was citing. It is the 35-and-out feature, and that is available at any age. I wanted to correct that.

Madam Chairman: We will have him bring more books next time.

The committee has made a decision in this matter and we had some very fruitful discussion, but the recommendation that has been made is that the committee, with reasons that will be set forth in its next report, has by motion recommended the following:

That the Minister of Education cause the Teachers' Superannuation Commission to pay Mrs. H survivor benefits as of August 8, 1985, and that the

Ministry of Education, within three months of this motion, report to this committee on the advisability of extending this benefit as a matter of right to spouses of teachers' superannuation fund members otherwise adversely affected.

We considered the date on or about November 22, 1988, to be when we anticipate that you will report back before this committee, which generally sits on Wednesday mornings from 10 to 12. That is our allotted time, and we anticipate appearance before that date before us with some kind of report—hopefully maybe even sooner—in writing.

Is there any further clarification or discussion on this? Seeing none, we thank you very much for coming before us today. I think the committee has nothing further to discuss other than this case at this time, so we are adjourned until tomorrow morning at 10 a.m. when we will continue expansion of jurisdiction. Thank you very much.

The committee adjourned at 4:32 p.m.

STANDING COMMITTEE ON THE OMBUDSMAN
EXPANSION OF OMBUDSMAN'S JURISDICTION

TUESDAY, AUGUST 23, 1988

Morning Sitting



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Elliot, R. Walter (Halton North L)
Bossy, Maurice L. (Chatham-Kent L)
Bryden, Marion (Beaches-Woodbine NDP)
Carrothers, Douglas A. (Oakville South L)
Henderson, D. James (Etobicoke-Humber L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
Mackenzie, Bob (Hamilton East NDP)
McLean, Allan K. (Simcoe East PC)
Pollock, Jim (Hastings-Peterborough PC)

Substitutions:

Harris, Michael D. (Nipissing PC) for Mr. McLean
McClelland, Carman (Brampton North L) for Mr. MacDonald
Philip, Ed (Etobicoke-Rexdale NDP) for Mr. Mackenzie

Clerk: Carrozza, Franco

Staff:

Wilson, Jennifer, Research Officer, Legislative Research Service

Witnesses:

From the Ontario Public Service Employees Union:
Usher, Sean, Co-ordinator, Education and Campaign
Sheppard, Patrick, Legal Counsel

From the Office of the Ombudsman:
Meslin, Eleanor, Executive Director
Zacks, Michael, General Counsel

Individual Presentations:

Campbell, Laura
Campbell, Cameron

ERRATUM: In issue B-31 the cover should read OMBUDSMAN'S RECOMMENDATIONS
DENIED.

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Tuesday, August 23, 1988

The committee met at 10:09 a.m. in committee room 1.

EXPANSION OF OMBUDSMAN'S JURISDICTION
(continued)

Madam. Chairman: Good morning. I call this meeting to order. Are there any comments from the committee before we commence? Any discussion? Anything of importance?

The Ombudsman committee is discussing the expansion of jurisdiction of the Ombudsman. We have before us today the Ontario Public Service Employees Union. Representing the union, we have Sean Usher, co-ordinator of education and campaign, and Patrick Sheppard, who is the legal counsel. I notice we have a brief. I do not know if you are reading from it, but make an opening statement and then if you can allow some time for the committee to make questions, we would appreciate that.

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

Mr. Usher: As everyone here knows, the Ontario Public Service Employees Union represents over 100,000 public sector employees in Ontario, close to 70,000 of whom work for the provincial government and the other 30,000 in various public sector agencies and institutions in education, health and social services.

We are particularly concerned today with the 5,700 employees in 48 public hospitals throughout Ontario and 900 employees in 12 children's aid societies. The proposed extension of the Ombudsman's jurisdiction is, therefore, not unimportant to us.

It is fair to point out that we exist to advance the interests of our members, both in negotiating terms and conditions of employment at the bargaining table and also in consistent and vigorous pressure for social change, not the least of which is appearing before committees such as this.

We have a strong commitment to social unionism and have been strong in backing the most disadvantaged groups in our society, such as psychiatric patients and those dependent upon social assistance. We have fought long and hard for the rights of ex-psychiatric patients and single mothers on family benefits assistance and also now we are very concerned about cutbacks in public services and privatization of those public services.

Of course, our fundamental concern is to negotiate collective agreements which provide decent wages and benefits and protect the rights and interests of our members. Most of our members have the protection of a collective agreement and can rely upon its grievance arbitration provisions to obtain redress against any arbitrary treatment. We would argue that union members are far better protected than those who are not organized into unions. Our members would appear, therefore, to have less need of assistance which can be afforded by the Office of the Ombudsman than workers who lack union protection.

However, there are formidable legislative restrictions imposed on our capacity to negotiate protections for our members. The members of this committee are quite aware from previous submissions we have made that the Crown Employees Collective Bargaining Act permits unbelievably limited scope for bargaining. The provincial law known as the Crown Employees Collective Bargaining Act, or CECBA for short, actually prohibits negotiations with respect to important matters such as pension entitlement and the introduction of new technology. It also denies union membership and the protection afforded by a collective agreement to a very large number of civil servants, excluding from coverage two or three times as many workers as any other counterpart provincial law.

In order that you fully understand our position on the unacceptable nature of the Crown Employees Collective Bargaining Act, I have provided copies of the April 1987 brief proposing amendments to that act, which was presented by OPSEU to a committee here.

OPSEU fully appreciates that the thrust of the Ombudsman's argument for extending the jurisdiction of his office to public hospitals and children's aid societies is the need to respond to complaints from those served by such organizations and by relatives of such persons. Consistent with our commitment to social unionism, we support such a broadened scope for people who seek redress against treatment which they perceive is unfair.

We are not without experience in this kind of situation because of the presence, for example, of rights advocates in psychiatric hospitals and so on. We may have had some difficulties in terms of dealing with individual situations, but in terms of concept we are not opposed.

We assert that employees ought to be entitled to lodge a complaint with the Office of the Ombudsman where the way they are treated does not permit them to seek redress under any applicable agreement. We note the comment of the Ombudsman in the September 1986 position paper on extended jurisdiction that grievance procedures would likely limit the number of staff complaints coming forward in public hospitals or children's aid societies; but where the matter in question does not fall within the provisions of the collective agreement, and where the employee in question does not fall within the bargaining unit, OPSEU feels that the additional avenue of complaint to the Office of the Ombudsman should be available.

We do not suppose that extending the jurisdiction of the Ombudsman will transform the situation of workers in public hospitals and children's aid societies, since there has clearly not been any radical impact on those workers already within that jurisdiction. We have had experience with the Office of the Ombudsman, particularly respecting electronic monitoring of employees in data entry workstations within various Ontario public service workplaces.

Denied the right to negotiate this practice by the restrictive provisions of the Crown Employees Collective Bargaining Act, which I referred to earlier, we asked the Ombudsman to investigate our contention that such monitoring of some employees constitutes discrimination under the Human Rights Code and is a violation of the Charter of Rights and Freedoms. We also asked the Ombudsman to find that such monitoring is inhumane and unfair and has a detrimental effect on data entry workers.

Although the Ombudsman agreed to investigate our complaint, it was not upheld. In fact, this reflected the unwillingness of a number of the monitored employees to participate in the investigation. I can answer some questions on that later. Our failure to secure a satisfactory outcome to this initiative inclines our union to suppose that the treatment of workers in public hospitals and children's aid societies will probably not be much affected by the extension of jurisdiction.

This view reflects not only the experience we have mentioned, but the fact that the power of the Ombudsman is essentially recommendatory. Even where a complaint is upheld, the governmental organization concerned is free to decide, as the Ombudsman Act puts it, "the steps, if any, that it proposes to take" by way of response.

We are cognizant of the fact that you are not considering the status of enforceability of the findings of the Ombudsman, but we feel bound to point out that the current government, like its predecessor, has not been willing always to accept and implement all the findings.

However, despite these cautions, we believe the jurisdiction of the Ombudsman should be extended to provide an additional recourse for appeal against arbitrary treatment of the staff of the institutions concerned, as well as the people they serve. We therefore urge the members of the standing committee on the Ombudsman to approve the extended jurisdiction as was proposed.

Mr. Philip: I wonder if you can tell us what percentage of those working in public hospitals—I am now talking about the provincial hospitals—would actually be represented by a union, either yours, the Registered Nurses Association of Ontario or any one of the other unions; or the converse, what percentage of employees would not be unionized who would be working in a hospital setting?

Mr. Usher: Frankly, Mr. Philip, I do not know the answer to that, but I am very happy to have our researchers look at it and get back to the committee.

Mr. Philip: I have heard from management-level people in hospitals that if arbitrary decisions are taken to them, there is very little they can do other than to go to a good labour lawyer and sue the hospital or something like that, which can be quite damaging to one's future career.

Mr. Usher: Without getting into looking at how many are or are not represented by a trade union, I think it is fair to say that many of the contracts with hospitals do not have very good language when it comes to grievance processes. I think that is significant in itself. I would be happy to get the information for you on representation.

Mr. Philip: I wonder if you can tell us the type of complaint that you see the Ombudsman possibly handling, even where you are representing, say, the registered nursing assistants or the nursing staff or the technicians in a hospital. Could you give us an example?

1020

Mr. Sheppard: I think one of the possibilities is not dissimilar to the complaints that came forward from the public servants, which were changes of a technical nature in their job and different methods of appraising them,

different methods of determining their productivity and so on, which, frankly, are inhumane and unfair and discriminate against them as opposed to their co-workers who are not involved in such revised technical operations. I think that is going to be a growth area in employee complaints as we become much more involved with high-tech changes in the workplace.

Mr. Philip: The public accounts committee, as you no doubt are aware, did an inquiry and turned out a fairly tough report on mental health services in this province. One of the things that came out during that inquiry was that some institutions or wards seem to be more heavily staffed than others. Would an area in which the Ombudsman could look at a complaint be from employees who feel that perhaps administration is overly working some of them as compared to others and that might not be covered by the collective bargaining agreement? Is that another area that could be—

Mr. Usher: It could be. I have not had that experience, but it could be, yes.

Mr. Philip: I will have to share one with you then. I am working on one at the moment, in co-operation with the union reps, I might add.

One of the complaints I have had from police officers—and it is a position their association does not take—is that they say they would like an independent police investigation, because if they are accused of wrongdoing, there is always the suspicion that if the police investigate the police, there is somehow not a completely clean investigation.

Is it your feeling that if one of your members is accused by a patient of something, it is better to have someone like the Ombudsman rather than an in-house investigation in order to protect his reputation as to the fairness of the investigation?

Mr. Sheppard: As in all these labour types of matters, there are two interests—maybe there are even three interests—to be protected. Of course, from our point of view, the prime interest has to be the protection of the rights of the worker.

As the brief indicates, we are not unaware of the fact that from time to time there are legitimate complaints that come out of institutions around the province. That is why we have not been upset by or opposed to programs such as advocates in the hospitals to assist patients. Similarly, we have not been upset but take part in a number of things like public inquests when citizens die in circumstances in institutions or jails in this province that deserve review. We can come forward and make positive suggestions there as well.

I think you are raising a fundamentally interesting question about the way the Ombudsman has conducted his work. How much of his work is public and how much of his work is private in the sense that he works without the glare of a courtroom or a committee meeting like this?

I think it is important for the complainant and the Ombudsman's office to agree on how the complaint is to be investigated. I do not think that often the complainant's best interest is served by a high-profile public investigation. However, when it is a question of a complainant such as a trade union, like OPSEU, and there is the protection of the whole corporate body of the trade union behind the complainants, then complainants are more willing to come forward, on the basis that it is the union which will take the flak.

Frankly, our experience with the Ombudsman—and I hope the Ombudsman's

office is not discouraged by that experience—is that some of the salutary value, if that is the right word, of making a complaint comes from the fact that it exposes practices in various ministries which senior politicians or senior administrators were either unaware of or thought did not matter but suddenly, on review, because it is now a public issue, decide does matter. I guess I have one example of that out of our experience in electronic monitoring.

Our complaint was made to the Ombudsman publicly, here in this building on June 12, 1986. By August 16, 1986, the Ministry of Labour had unplugged a number of its monitoring devices and machines. Obviously, they would be very sensitive to that kind of an issue, because they are the ministry that is supposed to be watch-guarding the rights of workers in this province. So, irrespective of the Ombudsman's investigation, the methodology of presenting the complaint got us a result in that particular case.

That is a long answer to your question, but I guess I am coming down to saying it depends on the circumstances and how the complaint is presented.

Mr. Philip: This Ombudsman has been interested in writing reports from time to time on the systemic problems. Since you represent people working in a variety of hospitals, do you feel that there are inconsistencies in quality control, if you want, from one hospital to the other and that perhaps the ability of the Ombudsman to examine systems problems might result in a higher standard across the province, some consistencies in standards from one hospital to another?

Mr. Usher: I think it is true that if it were addressed, that would be the case.

Mr. Elliot: I have a supplementary question related to the first point Mr. Philip made, with respect to the 12 children's aid societies this union represents. Our information is that there are 54 of them in the province. I was wondering if you might have available to you the same kind of information with respect to the other 42 societies, so that we have some idea of how many employees are not covered in that area as well.

I think probably I will ask the same question as a resource from the children's aid society people when they come before us later in the week, but I would appreciate that information in case they do not have it. They sometimes do not.

Mr. Usher: I will be happy to supply that.

Mr. Elliot: Good. Second, on the last page of your brief there is one piece of information I would like to comment upon. It is, "We feel bound to point out that the current government, like its predecessor, has not been willing to accept and implement all of those findings."

The type of information that has really impressed me, as a new committee member on this committee, with respect to the success rate of the support—it is quite astounding really that for the full year we have had an opportunity to supervise the area, the number of complaints coming in is in the order of 17,000 of which, boiled down at the beginning of our hearings last year, there were 22 unresolved. We heard eight of them and found in favour in seven of those eight. That kind of generalization in the brief bothers me just a bit, because we are now into the second year that I have had some experience in this area, and we are up to 22,000 with the same kind of accomplishment related to the complaints given to the Ombudsman.

I wanted to add that comment for the public record, because this is part of the public record. That kind of allegation in a general way really does not reflect, I think, what is actually happening year by year, at least in the last couple of years, as far as the success rate goes.

Mr. Philip: Could we have Mrs. Meslin comment on that because I think she is in agreement, and perhaps it would be useful to have the Ombudsman on the record on that?

Mr. Elliot: This was exactly what I was going to suggest, that perhaps the Ombudsman's office wants to refer to this too. If they wish to do so, I would be pleased.

1030

Mrs. Meslin: I agree entirely with Mr. Elliot. I am assuming that the point that OPSEU is making is that they feel that the government, either this one or its predecessor, has not implemented our findings. I do not know of any specific cases when cases have come before this committee in which a ministry has refused to implement a recommendation.

This committee has recommended that they agree with the Ombudsman that those findings have not been implemented. It may well be that the committee disagrees or it may well be that we do not support it. But I really do not know of instances in which that has happened.

Mr. Usher: This was based on information supplied by some of our staff who had people calling in to say things had not changed in certain situations. I will be glad to get the specifics on that and get back to you.

Mr. Philip: There have been problems in the past with the Workers' Compensation Board, but more recently I think all of our recommendations have been implemented. Certainly if there are some that have not been implemented and that the Ombudsman thinks and we think have been implemented and you have any information to that effect, woe be it to the public servant who is going to be recalled before the committee, having said that he has implemented the recommendation.

Mr. Elliot: If I could make an observation here, I would appreciate it, when I am questioning, if I were allowed to continue. I think it is appropriate for the members of the committee to go through the chair in situations like this, because this is exactly the point I was making.

I suspect that your staff has some sort of allegation to back up that kind of statement in a written report. I really think that kind of documentation would be very helpful to the committee. If in fact individuals out there are not being satisfied, we would like to know about that.

Interjection: We would be glad to.

Mr. Harris: Get the Ombudsman to investigate your complaint about how the Ombudsman operates.

Mr. Elliot: That would be a good idea too.

Mr. Usher: I think one of the things that I would like to respond to, in the context of your requests, is the fact that there is a tremendous nervousness on the part of our members who are employees to come forward.

Very often their complaints go to a particular point where we say: "OK, now you are on. You have to come up with statements that you can support and stand behind." There is a real reluctance on the part of a number of employees because they feel threatened coming forward, not necessarily in awe of the Ombudsman's office, but because their employment situation is threatened.

I must admit difficulty on our part in bringing people to the point where they are prepared to testify or give information. There is that reluctance. We have experienced that on a number of occasions.

Mr. Sheppard: The oaths of public servants under the Public Service Act tend to intimidate public servants from saying anything. You may know of a few rare examples, but most of them view that oath as meaning that they shut up and say nothing.

Mr. Usher: I think it is fair to say we have been frustrated by this and so has the Ombudsman's office, in fairness to the Ombudsman's office.

Madam Chairman: I was going to bring up the exact point Mr. Elliot made. I just wanted to put it on the record as well. I think a number of us have the concern about your points in the second-last paragraph on page 5. I would like to request that at some point you clarify that paragraph for us because I know it got my back up as well. I think we are all patting ourselves for the response and for the effectiveness of this committee. I think that goes against that matter.

I just had a question and maybe you have just answered it. I would like to keep it on topic, but I am looking at the last two lines on page 4 where you pointed out an instance in which a case was taken to the Ombudsman and the Ombudsman agreed to investigate the complaint. You said it was not upheld. I am not sure whether that means the Ombudsman did not feel that a recommendation was necessary.

Then you go on to say that part of the reason was that there was unwillingness by the employees to participate in the investigation. I am not sure whether that means it was within the jurisdiction or whether in fact the Ombudsman's mandate is that he has to have a specific complaint from a specific person before he can press ahead. It is a little bit unclear what you have put there. Mr. Sheppard?

Mr. Sheppard: Maybe I will start and Mrs. Meslin can continue. I think that, in fairness, the Ombudsman has to determine initially whether the factual evidence is there to support the complaint, the allegation, or whether it is just factually untrue. If it is factually untrue, his role, in my view, is probably at an end, unless he is collecting systemic information for some other purpose.

But why this frustrates us is that we know things to be factually true from workplace experience and gossip. When you then try to prove that in a normal legal system, you have to have a fairly significant amount of evidence, not just gossip and so on. Maybe the example referred to there I will call the Hamilton Ontario health insurance plan example, because that was the one the union is referring to there.

It was a question of a supervisor listening in on telephone conversations in the workplace. The information was confirmed by the supplier of the phone equipment, but our members, whom I suppose you would view as our responsibility, just were scared silly. They were not prepared to come forward

as a group and make that complaint stick. So the Ombudsman was left in the position that we had not proved our complaint and therefore that file was closed.

That happened several times in various examples over the last couple of years as we explored electronic monitoring in a number of ministries. It happened personally to me, along with OPSEU researchers, where we would phone up complainants in various workplaces. They would be in tears when we would talk to them. These would be keystroke operators who had operated keystroke machines—older technology—for the ministries for twenty years, who were now 40 and whose fingers were not as nimble as they were when they were 20. They could not do 15,000 keystrokes an hour, as they had been able to do, and they were getting pressure from supervisors for bad job performance, all we thought very legitimate matters of complaint.

But having told all this to the union, when it came to actually coming forward to the Ombudsman's investigator and being willing to really stand behind it, they were reluctant to do that. As an ongoing committee, you should be aware of that, because it is one of the problems in making the Ombudsman's office effective, it is one of the problems for a trade union in making the voice of its members properly heard. That is the kind of frustration and example we were trying to address at that point.

Madam Chairman: Well, as a lawyer, which is my background, I do firmly believe in the "innocent until proven guilty" scenario of our justice system. Perhaps that is why I support the role of the Ombudsman. Given that we are not really looking at how the Ombudsman can investigate a particular case, the procedure which is used by that office will continue, as I understand it. It will just be expanded into new areas.

Mr. Sheppard: Oh, yes.

Madam Chairman: You are expressing the concerns which you have just expressed on the complaint procedure and the inability in many instances to get employees to participate in the complaint process. Why are you still recommending that the Ombudsman's office have the expanded jurisdiction to look into these two areas?

Mr. Usher: Because the Ombudsman's office has performed a very valuable service in certain cases where people did come forward, where the investigation did take place and where there was a positive result. Basically, we support that principle. It is not without difficulties, and we are saying, rather publicly, "Let's not think that this is a panacea for all the difficulties that employees have." We fully support it. I do not think there is an equivocation on our part to doing the expansion.

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Mr. McClelland: Without getting into great detail about philosophical bases and approaches to law, I am curious about the quantum leap that I see. Maybe it is because I do not fully understand it, so I am going to be inviting your assistance on this.

Starting with the second paragraph on page 3, talking about what I understood to be the major thrust, the expansion of the jurisdiction of the Ombudsman's office to respond primarily to those who are served by the organizations in question, then we take a dramatic quantum leap, if you will, into the area of employees.

With regard to what I suggest to you has been developed over a long period of time, a fairly sophisticated system of equality, notwithstanding your arguments to the contrary—I am sure you will expand on those—we have a system that tries to build in, in terms of the collective agreement process, checks and balances, give and take. We end up with an agreement that both parties by and large agree to live with. Oftentimes, neither of them is terribly satisfied. It is usually indicative of a fairly good agreement, it seems to me, when both parties feel they have given up and both parties feel they have gained.

It seems to me what you are suggesting here is that we want to introduce another ingredient into it—to really redress or re-evaluate the balance or the process that we have in a collective agreement and in labour relations matters in your particular area of interest. I am just stating very candidly that I am concerned about that thrust.

It seems to me what we are doing is saying: "We want to change the way we have approached this. We want to add another ingredient, another tool, which says effectively that we did not deal with it in terms of the collective agreement. We look back on it and say: 'Hey, we made a bad deal in this area. We want to have another card to play.'"

It seems to me it is changing significantly the process of collective agreement, the process of balance and the process of give and take. In effect, it introduces an appeal process throughout that period when the whole idea of a collective agreement is that we have an established relationship.

I would invite your comments. Perhaps Mr. Sheppard might want to comment because of his background in labour relations. I throw that out. I think you see where I am coming from.

Mr. Usher: I do indeed.

Mr. McClelland: It could take a great deal of time to articulate.

Mr. Usher: I have also been trying to measure your quantum leap.

Our first argument is that the Crown Employees Collective Bargaining Act itself proscribes negotiations in particular areas. We do not have the right under the law to negotiate certain things which we have mentioned and which are available to you at length in the brief that we presented about a year ago on proposed changes to the Crown Employees Collective Bargaining Act.

In those areas, for example in new technology, the Ombudsman's office does provide a window for redress, but only because the issues themselves are not on the bargaining table and cannot be because of the Crown Employees Collective Bargaining Act. While you may see a particular quantum leap on our part in making our presentation, I would invite you to back up the quantum leap to the Crown Employees Collective Bargaining Act, which really merits and deserves very focused attention in terms of the context of today's society and the things that are important to us to bargain about.

Mr. McClelland: I do not want to and it was not my intent to necessarily engage in a debate, because I do not see myself as being at odds with what you are saying. Quite the contrary. What I am suggesting though, I think in fairness, is to flush it out and see the other side.

I can hear concerns being expressed down the road, saying, "What you are

asking for effectively is a foot in the door to extend." The first step is that we are only going to deal with things that are outside the scope of collective bargaining. Then you have the hook. You are in the door and you begin to effectively use that to lever other items, which is a natural process, as we know. That is the concern that I think needs to be addressed more specifically. I fully understand what you are saying about that, outside of that you want the Ombudsman to deal with areas outside of his scope, those items that are available for negotiation.

Having done that, though, it seems to me the next step that clearly follows is that it becomes part and parcel of the leverage process of negotiating those things that are within the scope of collective bargaining negotiations. That is the concern I see coming down the road.

Mr. Usher: I invite you to enjoin our concern where very legitimate areas of negotiation within the private sector, such as technological change, are in fact proscribed by law for civil servants. That is without getting into the whole array of things that are—you see, your statement earlier presupposed that everything is on the table in collective bargaining. It absolutely did. Well, it is not. That is why I say, yes, it is a foot in the door and the more we get that door open, the happier we will be that we are truly negotiating everything that should be negotiated.

Mr. McClelland: I apologize if I gave you the impression that I presumed everything was open. I recognize and realize it was not, and indeed you say so in your brief and drew that to our attention. What I was suggesting was the point I followed up on. As I said, I am not about to nor is it my intent to engage in debate. I am just throwing out for our consideration the fact that it would be seen as part of the package, the impact of which may be to effectively readdress the balance of the negotiating process. It is something that has to be considered in total.

Mr. Pollock: Just a quick question: does your union represent all children's aid societies?

Mr. Usher: Yes; 12.

Mr. Pollock: If the Ombudsman's office expands jurisdiction over all of the children's aid societies, do you see it that this would mean the Ombudsman would actually be speaking for those children's aid societies and that there would be a lack of coming forward and being members of your union? Do you see that as of any concern?

Mr. Usher: That our membership would use the Ombudsman's office rather than the collective bargaining process?

Mr. Pollock: Well, more that those people who are not unionized would not get excited about becoming unionized.

Mr. Usher: I do not see that as a problem.

Mr. Pollock: You do not see that as a problem at all.

Mr. Usher: No.

Mr. Sheppard: Remember that if complaints are incorrectly addressed to the Ombudsman's office, if the system is working properly, the Ombudsman's office is going to send those back to the union. If it is a complaint that

could be the subject of a grievance, the Ombudsman's office has enough to do as it is—I probably should let them say this—without taking on the role of trade union representative for a bargaining unit. They will be sending that complaint, I hope, back to the trade union and explaining to the complainant that is where the complaint must first endeavour to be resolved before you would wind up at the Ombudsman's office.

Mr. Pollock: I agree with that. I have no problem with that at all in the children's aid societies that are unionized, but when they are not unionized, they really would not have any other course but to go to the Ombudsman, for whatever reason.

Mr. Sheppard: That is true, but unless the Ombudsman's office becomes incredibly broader and incredibly more effective than it is, even today, I cannot imagine that it thinks it could replace the function of a trade union, even for the unorganized bargaining.

Mr. Usher: In fact, it might have the opposite effect.

Mr. Sheppard: Yes. It might encourage people to get organized and negotiate a contract.

Mr. Pollock: There is a possibility, sure.

Mr. Philip: On that, even if the Ombudsman received jurisdiction, there would be certain matters, such as negotiating salaries and so forth, that would not fall under his jurisdiction anyway.

Mr. Sheppard: Classifications; promotion procedures.

Mr. Philip: One last question: do you represent some of the employees in the provincial hospitals where the Ombudsman now has jurisdiction.

Mr. Usher: Yes.

Mr. Philip: Have you found that there have been any negative sides either to your employees or to management? Has there been any of what I would call a disruption to the system as a result of the jurisdiction of the Ombudsman in those instances?

Mr. Usher: I am not aware that there has been at all.

Mr. Philip: In terms of children's aid societies, I am sure you are aware of the internal appeal mechanisms by people who are not happy with decisions of children's aid societies. Do you feel the Ombudsman would end up with a very large case load if we were to extend his jurisdiction the way he requests, or are we talking about a relatively small number of cases, from your experience?

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Mr. Usher: From our experience, and I think we were at pains to point this out, it would be, at least initially, relatively small. People have nervousness about coming forward, about defining what their problems are, and I do not see any huge growth in it. I think that is what we are trying to say.

Madam Chairman: Any further questions from the committee? There being none, thank you very much for coming before us today. We do look forward

to further information with regard to Mr. Elliot's question on page 5 of your brief, and we thank you very much for taking the time.

Although our agenda does not call for us to commence again until 11 o'clock, our next people are here, so can we get some order back in the room?

Thank you for resuming so quickly. Although our agenda says 11 o'clock, I thought that as Mr. and Mrs. Campbell are here now, we could press ahead with the next presentation, rather than delay the process. We have before us today Laura and Cameron Campbell. They are going to be speaking with regard to the children's aid society, and they have presented a brief which is before you.

We would appreciate it if you would read or present whatever you have, but keep in mind that the committee would like to ask some questions after you have completed.

LAURA AND CAMERON CAMPBELL

Mr. C. Campbell: Two years ago, Dr. Daniel Hill's position paper to this committee outlined an expanded role for the Office of the Ombudsman. His reasons for an enlarged sphere of responsibility have been eloquently put forward, but in large measure we think he simply responded to an urgent public need for an impartial counterweight to arbitrary or unjust actions by certain types of government-funded private institutions, in particular, public hospitals and children's aid societies.

My wife and I are here to speak in support of Dr. Hill's proposal. We would like to offer as evidence some personal insights into the way in which one major public hospital and one children's aid society treated our family over the past year.

To introduce ourselves, for the record, we are Cameron and Laura Campbell. We live in Metro Toronto and are constituents of the member for Etobicoke-Humber (Mr. Henderson). I work for Ontario Hydro across the street. My wife is a personnel recruiter who is now a homemaker.

At 9 a.m. on the morning of March 16, 1987, our nine-months-old daughter, Elizabeth, was rushed from her Mississauga babysitter's by ambulance to be admitted to the hospital we will discuss today. The ambulance attendants found her in convulsions and very near death. This came after a month of unusual flu-like illness throughout which she kept getting sick at her babysitter's, starting from her very first day there.

The doctors at this hospital's intensive care unit found Elizabeth had in fact been violently abused. She was a victim of what they called "shaken child syndrome," causing severe shock symptoms, bleeding of the retinas of the eyes and on the surface of the brain. The vomiting this causes is often, and is easily mistaken for flu.

The intensive care staff in this hospital saved Elizabeth's life—there is no doubt about that—but a doctor on the hospital's suspected child abuse and neglect, or SCAN, team made some disastrous errors in pursuing his reporting responsibilities under Ontario's Child and Family Services Act, which obliges professionals to report cases of abuse.

That physician, whom we will call Dr. X, for reasons that remain a mystery to us and to virtually every physician who has looked at this case,

decided that my wife and I had harmed our child. According to the Peel Regional Police officers who originally investigated the babysitter, Dr. X told them it was "extremely unlikely" that the sitter could be guilty of this crime.

Guided by him and his reputation in the child abuse field, which is a substantial one, the police focused their investigation on us, waiving their usual practice of sending forensic photographic and identification teams to the scene of the alleged assault. No one questioned the sitter's child who was present that morning.

Dr. X substantially exceeded his mandate and decided who was innocent and who was guilty without even laying eyes on the sitter, and withheld key medical evidence from the police: a CAT scan revealing that Elizabeth had been abused on at least one other occasion coinciding with times when she got violently ill at the sitter's in that critical month. The evidence Dr. X failed to bring forward was evidence which did not support his conclusion. It remained buried in hospital records until a subpoena uncovered it weeks later.

Dr. X also advised the children's aid society of our presumed guilt in this case, and consequently they apprehended her while she was still a patient and they took her into their custody.

What happened to us at this hospital was a flagrant abuse of our rights under the law and as parents of a patient in their care. Let me outline some of what happened to us at the hospital while our daughter was critically injured.

SCAN set up police interrogations in their hospital offices where we were brow-beaten separately, without counsel, without being advised of our rights and without witnesses. We were accused of battering our child whom we had just been told might die. We had been by her bedside at that point for over 36 hours with little food or sleep.

On March 24, 1987, Dr. X summoned us to what he called a "case conference." Key doctors from radiology who disagreed with his assessment were excluded, as we were until virtually the meeting's end. When we were allowed into the room, we saw that it was in fact a kind of trial which ended with the police shouting that we were lying and were guilty.

To help the doctors, we had prepared a detailed record of Elizabeth's medical history and her whereabouts for the previous month of illness, including an earlier trip to the same hospital's emergency department. The record showed how her health deteriorated in direct proportion to the extent of her exposure to the sitter. The records we tried to present closely matched those of Elizabeth's own paediatrician, Dr. Jim McKendry, also on senior staff at this hospital.

They were swept aside. They were excluded from the file as was any record of the conference itself and record of the earlier visit to emergency. There are also no minutes of this meeting.

Throughout our daughter's five weeks in hospital, the nurses attending her had instructions to record our comings and goings to her bedside and all our conversations. Incredible as it may seem, the records show that we were actually spied on.

The hospital's policy seems to have been a deliberate and calculated

attempt to put two distraught and exhausted parents through whatever pain and psychological stress was necessary for a confession to something we did not do. Neither of us was given any presumption of innocence nor consideration as parents of a critically injured child.

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SCAN's efforts were directed only towards proving Dr. X correct despite the fact that many other doctors and nurses at this hospital felt the medical facts did not support his conclusion.

Dr. X also erred in insisting that our daughter suffered a skull fracture, which caused us additional grief and confusion in court. He was later proven wrong here as well. On the basis of one influential and powerful doctor's opinion, the two of us were condemned outright and contrary views, of which there were many, were suppressed or ignored.

Throughout Elizabeth's hospitalization and since, we have pressed for an investigation of the babysitter and at the very least a warning to other parents using her private day care. To our knowledge, she continues to sit other children whose parents remain unaware of any of this.

Why did this happen? To find out, we asked the hospital on June 30 last year for an independent review of all the medical evidence, because so much of the file flatly contradicted SCAN's official conclusion, but the hospital left the problem to SCAN, whose director knew nothing of the case.

What happened then staggered us. The SCAN director invited the babysitter's lawyer to the case review and was prepared to hand him details of our child's medical file without our permission. This was evidence, I remind you, in a criminal case still under investigation. She tried to get all the doctors involved in the review, but tried to exclude us, the parents, even though we had initiated it. She cancelled the review when some doctors would not co-operate and we questioned what was going on.

This matter is still not resolved between us and the hospital.

I hope we have provided some insights on why we think the Ombudsman should extend his jurisdiction in this direction.

Let's turn to the role in this affair of the children's aid society in question. The CAS was first alerted by the hospital when it was discovered our child had been abused. Their subsequent behaviour in this fiasco is almost beyond belief.

To explain, from our point of view, the children's aid societies seem to like to work in secret, citing the need to protect the identity of the child. That is laudable in theory, but in practice it helps children's aid avoid scrutiny, giving them, for example, the power to bar courtrooms to reporters who would otherwise see how they operate.

To a very large degree, the manner in which children's aid acts has arisen largely, we feel, because no one is watching over its shoulder. The Ombudsman seeks to change that, at least on a case-by-case basis.

The CAS apprehended our child without our knowledge on Friday, April 10, 1987. We had fully expected to be routinely questioned weeks earlier, and at our request, they met us on March 31. Their questions at that meeting were

innocuous, so we assumed they would move on to the sitter. Instead, they were preparing to seize Elizabeth. The day they did, they called us to a meeting at their local branch offices for the following Monday. No one would tell us what was going on or what this planned meeting was about. We honestly had no idea what they wanted, and so as a precaution we invited a friend along as a witness.

They were terrified that this friend was a lawyer and wanted her barred from the room, which we refused to agree to. Then, citing a letter from Dr. X we had never seen before, they served us court papers showing that they had taken legal interim custody of our child and were taking us to family court to decide her future. We were in absolute shock and we had two days to find counsel. The letter from Dr. X was dated March 27, a full week before the police finally finished with the sitter. He pre-empted the police conclusions.

Thus began seven long, frustrating months of adversarial court proceedings in which we did not once have an opportunity to speak. Our baby was in the CAS custody and we had to show why she should be returned.

In family law, there is something called "reverse onus." We were amazed to learn that the law in this instance says that you are guilty until proven innocent, despite the Magna Carta, habeas corpus and 1,000 years of legal precedent; everything we have learned. The children's aid can take your child without a warrant, present quite admissible evidence to a perhaps doubting but take-no-chances judge and let the parents work at convincing the court why the child should be returned. No police officer in this country has that power. The CAS had to prove nothing, just raise doubts in the judge's mind. We had to prove we were innocent, which was virtually impossible, as both we and the sitter had equal access to Elizabeth.

When your child is a hostage, it is a powerful incentive to good behaviour, because you are being examined by a case worker who arbitrarily decides your fitness as a parent. I do not use the word "hostage" lightly. I think it is appropriate, because no one in the children's aid, outside its conscientious medical staff, showed any sincere interest in her welfare. She was just a pawn in a power struggle.

This system is supposed to stifle outrage or protest and guarantee silence. The CAS was amazed that we were open about the situation with our friends and colleagues. We had nothing to hide. We knew we were innocent and we were confident that a careful investigation would confirm it. But it was completely inconceivable to the CAS, not only that Dr. X could be wrong, but also that it could be wrong. So, apparently, works the official mind.

The CAS, with reverse onus, seemed confident that by dragging out the case, it would win. On the other hand, we were afraid that, although innocent, we would run out of money and might lose Elizabeth. Nevertheless, we still had some faith that the system would subject the sitter to the same scrutiny we were prepared to undergo, so long as everyone was treated equally. That was not the case. The case worker told us they did not have the right to go after the sitter because she was what they called an "unrelated care giver."

An Ottawa physician and child abuse expert at the Children's Hospital of Eastern Ontario, Dr. Maureen Finnegan, looked at all the medical evidence in this case and was perplexed at our being singled out. She urged that the sitter too get psychiatric testing. Nevertheless, the CAS insisted she was "not at issue," to use its words, because it told us Elizabeth was not going back there. They seemed to have blinkers on. So we turned to the Ministry of Community and Social Services.

I finally persuaded a Comsoc program supervisor that there was something serious here and that I did not believe the CAS investigating us had also passed medical evidence implicating the babysitter, who is a Mississauga resident, to the Children's Aid Society of the Region of Peel. He followed up and told me, on July 27 of last year, that the local CAS branch director in the children's aid society we were dealing with had assured him that everything had been passed to Peel. We have reason to believe that the information in question was never passed on. So we were left with no one to turn to for help. We were unable to focus anyone's attention on our plight.

The Ombudsman maintains a strict policy of not investigating cases before the courts. So be it. If he had the legal mandate to investigate the handling of our case, we would ask him to find answers to the following: Why did the CAS blindly accept medical evidence presented by Dr. X which was deemed unacceptable by not one, but two successive medical directors at the children's aid society? Why did social workers not believe their own doctors?

Why did the CAS overrule the assessment of its own case worker, who admitted to the psychiatrist who assessed us, Dr. Graham Berman, that she did not believe we hurt our child. In her report on us she found "none of the usual indicators associated with physically abusive families," concluding, "It is unusual to come across a family quite as ideal and problem-free as this one."

Her superiors, on the other hand, interpreted this to mean that we were literally too good to be true. The case worker, caught between what she found and her intransigent superiors, told Laura, "Maybe you didn't do it, but you failed to protect your child." They seemed more afraid of losing a case than interested in finding the truth in this case.

We had psychiatric assessments, racing to find acceptable people, because the CAS was in no hurry to organize testing for many months. They were content to ask for repeated court adjournments. They had our child anyway, so why hurry?

The assessments, which included blind psychological testing by Dr. Paul Lerner, who is probably the top psychological tester in North America, came out very emphatically in our favour, prompting a judge to return Elizabeth to us last July, but with the restriction that neither of us could be alone with her at any time. That was like something akin to house arrest and was made worse by almost daily unannounced visits by the children's aid society case worker. We had to pay the full cost of the psychiatric examinations out of pocket. We were promised to be reimbursed one third by the CAS and one third by the official guardian's office. We did not want to pay for something that we did not want nor felt we needed, but we had no choice. It cost hundreds of dollars. It took eight months and many requests finally to collect the promised two thirds.

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Finally, Dr. Fred Baker, the CAS's newly appointed medical director, asked if he could see Elizabeth and interview us. He looked at all the medical evidence. He did his own checking of what had been submitted by Dr. X. He spoke to other doctors at the hospital who did not agree with Dr. X, including Elizabeth's own paediatrician.

Here is an excerpt from his report of August 7, 1987: "The parents are open people who are not trying to hide anything...I do not feel, from that

interview and from reviewing the documents which have been submitted to me from the children's aid society, that they were the abusers although I certainly agree that somebody was abusing this child."

Dr. Baker told us that he thought the social workers in charge of the case were wrong and should admit it. He put his views in writing, taking a stand against his own employers. Those views were presented in court. In eight months of court action, assessment and investigation, Dr. Baker was the only employee of the CAS to ask our views on what happened to Elizabeth. The CAS social workers in charge simply accepted Dr. X's views without reservation.

Dr. Baker was amazed to learn that the CAS supervisory staff and the branch director in the local office, the people who had overruled their own case worker, had not bothered to meet us and had no interest in meeting us. They argued that they could remain more objective that way. It seems they thought they would understand more by actually knowing less. We are looking at a faceless, closed bureaucracy here.

Still the children's aid society insisted on a trial. At a pre-trial hearing on August 24, provincial court judge Henry Vogelsang chastised them for what he called a pointless prosecution of a case for which they presented virtually no evidence and to which there was no logical end. He advised them to drop their case, warning that if they pursued it to a full trial they would, in his opinion, lose. He asked them to consider the full consequences of that.

I should say a word or two about the lawyer appointed to represent Elizabeth by the office of the official guardian. When Judge Vogelsang was mystified as to why the CAS was adamant about pursuing us, there was an emotional outburst from the OG lawyer, who shouted, "I think a trial would be very therapeutic." This lawyer, in private practice, paid by the government to represent an infant, thought that the effect of the expense and suffering of a child on his client's parents would somehow be a positive experience for us.

The OG lawyer did nothing for his client. He sat down with us only once. He never took the trouble of seeing us together with Elizabeth. He attracted the adverse comments of three provincial court judges. In his final court appearance on November 16, when the CAS finally dropped everything, he refused to take any position at all.

That lack of effective representation was something that we, as Elizabeth's parents, could do nothing about. Our subsequent complaints were dismissed. His superiors deemed it acceptable not to take any position in court regarding an assaulted baby's future.

To a large degree, the CAS has appropriated the police's role in this case. They took important evidence and they mishandled it, contacting the sitter and discussing with her critical confidential medical information. Both Metropolitan Toronto and Peel regional police officers confided to us that this is a common problem.

To whom could we turn in such a situation? Laura and I, like many others in our situation, have not much access to legal redress at the best of times. People with no money get legal aid. The rich can afford litigation. Children's aid societies have plenty of legal staff, financed almost exclusively by the taxpayer.

It is not enough to prove the CAS wrong when it mistakenly seizes a

child. You have to prove that they knew they were wrong but went ahead anyway. That is impossible. They are essentially unaccountable to anybody.

The hospital in question saved our child's life and gave her excellent care. Dr. X did, to give him his due, correctly diagnose child abuse. He erred by playing judge and jury and by ignoring or overlooking evidence of multiple abuse implicating the sitter. What is needed in these cases is closer scrutiny when they go wrong, not necessarily lawsuits, which cannot correct what needs correcting.

The Ombudsman is neutral, nonpartisan and free. He is probably the closest thing to a knight in shining armour one is likely to find around government. The ordinary citizen needs someone who can investigate arbitrary abuses of power by private institutions spending government money.

These events have dominated our lives for 17 months now. We think about it every day. It cost us more than \$10,000 in legal fees, medical reports and psychiatric assessments, a figure which astounded our case worker. The children's aid society has not a clue what financial impact its actions have. Had this gone to a full trial, the bill would have been over \$20,000.

So far, this has probably involved a couple of hundred people—two children's aid societies, two police departments, three judges, plus lawyers, doctors, psychiatrists, nurses, social workers, civil servants and so on—all paid for by the taxpayer. I think the only people in this case not on the government's payroll are Laura and me. Virtually the entire child protection apparatus sent into action was dedicated towards proving a point that had little to do with the protection of our child or anyone else's. Elizabeth was not protected. This was all about power, budgets and keeping up appearances.

Let's remember, a real crime was committed here. Our daughter was brutally assaulted by a person we suspect needs professional help and is unlikely to seek it. Bear this in mind, please, if a spokesman for the hospitals or the children's aid societies tries to brush away the Ombudsman's rationale for investigating complaints against them with a lot of pious assertions that everything is under control. Theirs is too important a job not to be done right and subjected to scrutiny when it is not. I think the question has to be asked, who is to guard the guards?

We have had no explanations, no apologies, no restitution, no compensation and no justice. Our experience is not uncommon. We felt absolutely helpless against the awesome, unappealable power of the state. Going through a nightmare like this, to have the system let you down so badly in your first experience with it, makes you see the world differently. We just did not believe that we could be treated like this in our own province. These things are not supposed to happen in Ontario.

Madam Chairman and members of this committee, you have some difficult questions to deal with as you consider the Ombudsman's future role. From the perspective of Laura and I, Elizabeth and our families, please consider this: At a time of the greatest crisis for us, when we needed a powerful but impartial, nonpartisan agent to take a careful second look at this problem, give us a fair hearing and air all the facts, there was one available, the Ontario Ombudsman, but without the legal mandate to act.

As legislators, you have an opportunity to recommend a way the Ombudsman can remedy the worst of state-financed abuse of its citizens. We strongly urge you to endorse the Ombudsman's proposals to the Ontario Legislature.

Madam Chairman: Thank you very much for your presentation. I appreciate your not referencing the individuals, only because they do not have an opportunity to respond. I think the committee, in any event, got the feel for your dilemma and your problem. If, indeed, the Ombudsman ever has an opportunity to investigate it, he can investigate it more thoroughly with the individuals who are concerned.

Mr. Elliot: I would like to add my thanks to the Campbells for coming and imparting their really sad story to us. I think most of us who are in government are here because of being aware of situations such as this and trying to do something about them, although I am not personally aware of anything quite as graphic as what you have laid out in this particular situation.

I think the end result of your taking the time to come here, from my point of view anyway, will be that the government agencies and others that will be presenting to us—some already have; some will be presenting later in the week—are going to have to have some pretty strong arguments to counter the kind of concern that you people obviously have.

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I do not really have any comments or questions with respect to your brief, because you set it out very well. I did want to comment that, as far as I am concerned, you have a lot of support on the kinds of situations you are talking about here, because that is exactly what the Ombudsman's office is for. I think often, at the initial stages of an investigation such as your own, the fact that they are there monitoring the situation means that the initial misconceptions are addressed at that point and you would not get into the kind of mess you were in for such a long period of time.

Thank you very much for coming to the committee.

Mr. Henderson: I just want to make one or two short comments in addition to thanking Mr. and Mrs. Campbell for coming.

The first point I want to make is in the context of a discussion we had here a week or 10 days ago about whether individuals should be able to ask to come forward to the committee and present their personal experiences with some aspect of government. You may recall we touched on that very briefly and I made the point that there would be a presentation coming up that I hoped would underline my feeling that by far the lesser evil is to allow that to occur, and this is the case I had in mind. I think it does underline that, although not every case that comes to our attention may be as commanding and deserving as this one, nevertheless there is something very important in a mechanism being available whereby people can do this, and the standing committee on the Ombudsman is serving a very important function in providing for that.

The other thing I want to say by way of a footnote, I suppose, is that the Campbells brought this situation to me, as their MPP, about a year ago, and I had much the kind of reaction that Mr. Elliot has just described, perhaps even stronger, because the Campbells's experiences are in an area that I have had some involvement with professionally. I know some of the individuals involved, in addition to Dr. Berman and Dr. Lerner, who are both named in the report, both as outstanding individuals as you could find in this field, certainly in Toronto and probably in Canada. I do not think it is an exaggeration to say that they have international reputations.

As any of us would, I attempted to be of some help. I, too, got the kind of reaction the Campbells have alluded to, that I would, in effect, do well to stay out of it, the matter was in the courts, the ministry could do nothing, the children's aid society could do nothing, and the process would simply have to unfold. I heard that fairly emphatically from a number of sources, and felt in the end that about the only thing I could do beyond that would be to go public with the whole thing. I did not feel able to make a judgement that that would be in my constituents' best interests; so I did not.

I, too, felt paralysed and helpless in the face of a most remarkable, and to me bizarre, unfolding of events, and I echo all of the conclusions and sentiments and recommendations that the Campbells have put before us.

Mr. Pollock: I, too, want to join in thanking the Campbells for bringing this case forward. They make one of the strongest cases yet to have the Ombudsman expand his jurisdiction, and there is no question in my mind.

I had the privilege of sitting in on a hearing at one particular point in time, and I firmly agree with them that the individuals who are accused have to prove their innocence. It is not the other situation where you are innocent until proven guilty. I firmly believe their comments in that respect. I can appreciate what they went through. One particular question, and maybe I should not be asking it is, what was the form of child abuse? Was this baby-sitter shaking your child?

Mr. C. Campbell: That is what we believe: something called bilateral subdural hematomas. It means you have bleeding on the surface of the brain. There are all kinds of degrees of severity. This was severe enough to just about kill her. When she was in intensive care, she went in with pretty well a total circulatory collapse. She was in serious, serious shock; no life signs. Once they stabilized her, it was just a question of whether there would be brain damage. After she got out of intensive care, she was blind and was paralysed on the right side. Amazingly, that has all gone. She is a perfectly normal two-year-old from what we can see. There has been a lot of medical follow-up. This is a syndrome that is depressingly common in the literature.

Mrs. L. Campbell: I will just add that from what we can gather from reading all we have on shaken child syndrome, she is very lucky. We are lucky.

Mr. C. Campbell: She is lucky just to be alive, but she seems to be OK.

Mr. Pollock: Any further comments from Dr. X on his position?

Mr. C. Campbell: Nothing.

Mr. Pollock: Nothing at all. He never apologized in any way—

Mr. C. Campbell: Zero.

Mr. Pollock: He still believes his assumption was correct.

Mrs. L. Campbell: As far as we know, that is the case.

Mr. C. Campbell: We do know that this has happened to other parents. I know of one other case where the same doctor alleged something very similar and went to a full trial. Finally, it was proven medically to be a lot of nonsense. What had happened was something entirely natural to the child in

question. Dr. X maintained to the end that the parents had struck their child. It finally collapsed, but again, there was no follow-up. We are not the first to have been through this. That is not to say there are not many cases where parents are quite guilty, but there are certain cases where it is quite the opposite.

Mr. Pollock: Is Dr. X a prominent physician or doctor?

Mr. C. Campbell: I would say so, yes. I would say very prominent.

Mr. Carrothers: Is it in order to speak to the Ombudsman's office about how they would deal with this?

Madam Chairman: I think that would be appropriate.

Mr. Carrothers: I just want to come back to our discussions of the other day about hospitals. We now have a case of where things seem to have gone pretty wrong in a hospital. Again, the hospital does not seem to be in control of much of what goes on. It seems that within its walls, Dr. X was the key player here, who presumably is not a staff doctor and therefore would be independent of the hospital's control, and SCAN may be a committee of the hospital. I am just wondering if extending your jurisdiction to the public hospitals, leaving aside the CAS for now, would have allowed you to look at any of this or given you any input or any ability to deal with what happened in the hospital here, assuming Dr. X was not a staff doctor.

Mrs. Meslin: My assumption is that certainly there is a procedure which has to be followed within the hospital itself. The doctor may very well have an opinion, but that triggers a procedure and from what we read here, it would appear that there may well have been some errors procedurally in the way that evidence was gathered, in the way whatever had to happen happened within the hospital. So we are talking about the hospital administrative setting, as it were.

Mr. Carrothers: Probably just SCAN, the committee, which I guess is a hospital committee, and the way it acted.

Mrs. Meslin: Any of the committees which are set up to look at evidence or investigate, etc. Had we the jurisdiction, whether it was hospital or CAS, we could then look into the way in which those committees had functioned, what they did and whether they were moving correctly and reasonably.

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Mr. Carrothers: Turning, then, to the CAS, and given that this was a hearing in the court—I guess to get an interim order and then to get it to be made a final order—when would you have got involved had you had jurisdiction over the CAS? What would your reaction be to this case while it was before the courts?

Mr. Zacks: Assuming it has gone through the CAS complaint process, and it looks as though it probably did go through that process—

Mr. Carrothers: Well, the problem was that the CAS had moved to apprehend the child, had got a court order to do it and was now moving to make

it final. It was not within the internal complaint procedure within the CAS; now it was before the courts. What would you have done?

Mr. Zacks: There are a couple of things going on. First, they are before the courts on the question of the custody of the child, but also, from my understanding, what happened is that a number of procedural aspects were going on as well in terms of disclosing information and the relationship between the CAS and the hospital and so forth.

The way the Ombudsman looks at this, basically, is that if there is something before a court, he has the discretion to refuse to investigate that complaint; it is not an obligatory matter. It is a discretion he exercises frequently and with some consistency not to investigate a matter the identical issues of which are before the court. There are situations where in the past he has made a number of exceptions, but they are fairly few and far between. It would be a matter for the specific Ombudsman to decide, whether in this particular case, notwithstanding that the matter was before the courts, he would still investigate the complaint.

Mr. Carrothers: Assuming that you did take some jurisdiction while the thing was before the court, what aspects of it would you feel able to comment on?

Mr. Zacks: It is not necessarily a question of commenting. If the matter were before the courts, I would think the Ombudsman would not comment on the court side of it so as not to interfere in or prejudice what was before the courts, but that would not prevent him from investigating the case.

Mr. Carrothers: It seems to me that while it was before the court, the major problem was the fact that it was there and the type of evidence being brought forward, so that the bulk of the difficulty—

Mr. Zacks: The Ombudsman would not be able to interfere in what was before the courts and the courts' discretion.

Mr. Carrothers: So while it is before the courts, you would not be able to step in.

Mr. Zacks: Not in the court process.

Mr. Carrothers: You would not be able to give the parents any recourse for another venue of complaint, or some help?

Mr. Zacks: As I said, we would be able theoretically—there is a discretionary aspect at play here, but the Ombudsman does have the right to investigate a complaint even though it is before the courts. He does not do it, as a rule; in fact, it is a fairly standardized procedure not to do it, for obvious reasons. But he does have the right to investigate, even if it is before the court, but obviously he does not appear in court on behalf of complainants, or the government, for that matter. He would be doing his own investigation on those aspects that were within his jurisdiction.

Mr. Carrothers: Assuming just for a minute that this case had gone forward, had had a hearing at the court, the court had issued a final order for apprehension and kept the child in CAS custody, what would you then be able to do, given this fact situation?

Mr. Zacks: We could not affect the court order, obviously, but we

would be able to examine the way in which the CAS executed that order and its procedures and approaches to carrying out its responsibilities under the Child Welfare Act.

Mr. Carrothers: What I think I hear you saying, then, is that while the matter was before the court, even though it might have got there because of some arbitrary actions of some people perhaps not being as careful with their conclusions as they might be, you really would not be able to help the parents, nor would you be able to help the parents very much if the court had accepted that.

Mr. Zacks: Not with the main issue that they were concerned with, obviously. They were concerned about regaining custody of their child.

Mr. Carrothers: Yes.

Mr. Zacks: Once the matter was before the courts, we could not interfere in that court process.

Mr. Carrothers: But your involvement might be as a commentary on the type of problem in the case throughout.

Mr. Zacks: That is right, in terms of the way the children's aid society conducted itself. Our investigation, for that matter, would not be admissible evidence in a court proceeding.

Mrs. Meslin: I think the important thing, though, to note, as is so evident from the Campbells' presentation, is that when you come upon a situation like this is that you are doing it after the fact, of course, as everyone in this room is. Certain things have already been decided.

However, all of you have to be saying to yourselves, "How could this happen?" That is one of the watchdog importances of the Ombudsman, to be able to then take a look at a situation—you have a valid situation—and to ask, in effect, "Was what happened reasonable?" whether it was in the hospital or at the children's aid society, to go back through all the processes to be able to say if in fact we find they acted unreasonably in any event. We recommend this be changed.

I think one of the things the Campbells are saying is that not only were they in this terrible dilemma, but that there are also other people in the dilemma, and nothing will change. They had to go and fight their own fight, and nothing will change. What I read from this is that if the Ombudsman does have jurisdiction, it may well be that a lot will change.

Mr. Carrothers: But it is, again, commenting on what happened compared to really assisting the players, if I could use that word, when it is taking place. You really would not be able to help in this kind of hearing at all.

Ms. Meslin: Not, as Mr. Zacks pointed out, in the particular issue.

Mr. Zacks: The fact that there is somebody in the background with the authority at some stage to examine everything, all the documents and all the actions, and with the statutory right to get evidence under oath if necessary—in essence, to do a full-scale, exhaustive, thorough inquiry—does have a kind of salutary effect on individuals in government—it is my personal

opinion that I am expressing—in terms of they know that at the end of the road, the Ombudsman is sitting in the background.

I am not suggesting he is going to pounce, but the fact is that he is there with the right to look at everything and have a very broad investigation. That does have some type of influence when officials decide the courses of action to take, especially after the Ombudsman has been carrying on his function for over 12 years now.

Mr. Carrothers: I understand that. I was just trying to see what an issue could impact on and what it could not. I think I have a bit of a sense.

Madam Chairman: Dr. Henderson has a supplementary. I am sorry I did not jump in sooner. It is just that I felt Mr. Carrothers was really moving along a similar line to Dr. Henderson.

Mr. Henderson: Incidentally, I certainly agree with Mr. Zacks's last comment. I think that is exactly so.

If the Ombudsman had had jurisdiction and if the complaint had come, would you not have said, "You really should investigate the field procedures through the CAS and the ministry and so on before we get involved"?

Mr. Zacks: We would have to do that.

Mr. Henderson: Would the CAS not simply have said, "We can't really begin to examine your complaint until the courts are finished with it"?

Mr. Zacks: If the remedy the statute provides is carried out so as not to be withheld—let me put it that way—by the children's aid society, for whatever reason, theoretically the Campbells could—I think they did. They went to the ministry and complained at that stage. They took the final step under the legislation and they were not satisfied with the response they got. As soon as that ultimate stage is reached, they would come back to the Ombudsman, if they chose to, and if we had the authority, we would be able to investigate the entire process.

I think this is an interesting case that outlines the limitations we currently have, because at this point, if the court process were still outstanding, it would seem the ministry would probably say, "It's before the courts now; there's nothing we can do." We would be limited to simply looking at that decision, "Is that a reasonable decision to make, given what the procedures of the ministry are?"

Likely we would say it probably was reasonable not to go beyond it, because the ministry was simply looking at a situation that was before the courts and would not want to affect that outcome. The Ombudsman would not be limited in that way. He could go back and look at it if he felt it was an appropriate case.

Mr. Henderson: What I am concerned about—with all respect, I do not think your comment reassures me an awful lot—is that parents caught in this bind, as Mr. Campbell has said, feeling that they have to be on good behaviour or that they would be well advised to be on good behaviour, are likely to feel kind of put off by every level of appeal that is open to them, including perhaps the Ombudsman. I think it raises the question of how far we want to go, as the standing committee on the Ombudsman, in recommending some kind of

action to prevent this sort of situation occurring. My sentiment is that we ought to think about going fairly far.

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Mr. Zacks: I will be frank with you. In the vast majority of cases that come to us where the matter is before the courts, the Ombudsman will not investigate. I think there would have to be a very compelling fact situation for the Ombudsman to decide to investigate while the matter was before the courts. I am not saying this is not such a situation, but I am saying, basically, that this is how the Ombudsman looks at these specific cases.

Mr. Philip: Mr. Zacks, on page 11, the Campbells have noted that the children's aid society was content to ask for repeated court adjournments. In those areas where you have jurisdiction, one of the processes you often deal with is unreasonable delays in the handing out of justice. Is it fair to say that had you had jurisdiction over the children's aid, you at least could have looked at the reason there were so many adjournments and why the CAS was delaying this?

Mr. Zacks: Yes; absolutely.

Mr. Philip: My rough mathematical calculation is that these people were without their child for at least four months, or four months and change. Is that correct?

Mrs. L. Campbell: Four months, yes. She was one month in hospital and three months outside of the home.

Mr. Philip: So there was a spot when you could have been of some assistance to them.

Mr. Zacks: Yes; that is right.

Mr. Philip: Furthermore, you would have been of assistance in at least reviewing the case after they were done with it and perhaps ensuring this kind of arbitrary action did not take place for other families.

Mr. Zacks: That is true, and also, the Ombudsman would have reviewed the case once it came to him. In order to make his decision properly, he would have had to obtain all the information the children's aid society had at that point, and then decide. He would not do it solely on the information that was before him. He would want to make inquiries with the children's aid society to find out exactly what was going on, and then he would make his decision.

Mr. Philip: Could he also recommend some kind of compensation or would that be out of his jurisdiction?

Mr. Zacks: The Ombudsman can always recommend compensation.

Mr. Philip: So for the money they unnecessarily paid out—they said \$10,000, and that it could have been \$20,000 or higher—they could have been compensated for the way they were treated.

Mr. Zacks: He could make that recommendation, and if the society rejected it, it would be before the committee.

Mr. Philip: Mr. and Mrs. Campbell, I greatly appreciate your

appearing here. I know it is a painful experience for you to come public like this and relive the case. It is of help to us. I know that you have, personally, nothing to gain from it, and therefore it is all the more valuable.

I would like to ask you a question that just jumped out of the page when I saw page 14, about important personal information; that is, information concerning you and your child that was actually discussed by the children's aid worker with someone the police may or should have been investigating and possibly laying criminal charges against. If I were the Peel police, I would be absolutely furious at this, because surely, if charges were laid, the defence would have a tremendous vehicle on its side if it had inside information like that. Did the Peel police express any comments on the lack of professionalism by the CAS in question and how it may have hurt its investigation?

Mr. C. Campbell: When this case was dropped by the children's aid, it was dropped under the condition that we would not have a trial. They called it a settlement, but no money changed hands. They had supervision for three months, which brought us to the end of January, and then that was it. We were saved the ordeal of a trial, but not much else.

We took a week's holidays to get away and think. The day we got back we went to the Peel Regional Police and we took a stack of documents like this, which was all of the investigation material, all the medical records—everything—and said: "Here you are. This is what you should have been given to do your job." They were just completely astounded and said, "First of all, you should not have had to pay for this—your lawyer, subpoenas and what not," and proceeded to do some work.

But, unfortunately, there is a kind of interesting legal double standard that comes into play here in that, of course, if you are investigating a nonrelated care giver, somebody abusing somebody else's child or where there is an allegation of that, that person is innocent until proven guilty, and the burden of proof is very, very different. The rules of evidence in criminal court are very stringent, of course, and they had great difficulties. The police were quite gung-ho for a while. The crown attorney looked at it and said, "Gosh, it is very tough," and things eventually just petered out.

I think a lot of it was because the children's aid had contacted the sitter, and the police had to assume that the sitter had found out things, sort of a medical secret that was very key, which the sitter would not have known about otherwise, had found it out from the children's aid society, and it really made it very difficult from that point.

Mr. Philip: The CASs have appeared before us and said that they have an internal investigation system and, therefore, that we do not need the Ombudsman. You have experienced their internal investigation system.

Mr. C. Campbell: They deliberately misinterpreted things, we felt. Where there was a question of interpreting a fact one way or the other, they chose to interpret such and such a fact in such a way as to make and advance their own case.

Madam Chairman: Excuse me for interrupting. Just to correct the record, the Ontario Association of Children's Aid Societies is appearing before us this afternoon.

Mr. Philip: I am sorry. It was the ministry that represented the view that the children's aid—

Madam Chairman: The Ministry of Community and Social Services.

Mr. Philip: OK, I apologize. That is correct.

Madam Chairman: Sorry, I hate to interrupt.

Mr. Philip: I am glad you caught that, because I assumed that they were speaking for both the children's aid societies and the ministry and I gather they were not. Thank you, Madam Chairman.

The hospital association, I suspect, may take the position that there are internal methods of investigating. I do not know, because I know they have not appeared yet. Certainly the union representing hospital employees appeared and they were supportive of what the Ombudsman has asked.

Can you tell us about any internal investigations into this matter by the hospital in question?

Mr. C. Campbell: We went to the office of the patient representative in this hospital, who was extremely sympathetic, has a file of similar cases and has been working—I do not know how effectively—to try to get this to the attention of the president of the hospital. I think our credibility was enhanced by the fact that a friend of this person had gone through a similar experience, and she had it at first hand. I guess there is the feeling in this hospital that the suspected child abuse and neglect team is a bit of a law unto itself.

You have mentioned the Ontario Hospital Association, which has, in fact, quite well thought out guidelines for SCAN teams and what a doctor or a SCAN team should do when confronted with a case of apparent abuse. There are procedures that are laid out. We got hold of the booklet of these procedures and we compared what is supposed to happen with what in fact did happen—what we could see happened, anyhow—and the list of discrepancies got very long.

Mr. Philip: I am still not clear on what investigation happened. You went to the advocate in the hospital. Where did your complaint go from there? What was done with it?

Mr. C. Campbell: We asked for an independent review and we wanted it as impartial as possible. We hoped that perhaps somebody from the faculty of medicine at the University of Toronto could come in and have a look at things, or a senior physician, a sort of chief of medicine, could look at all the medical evidence, because most of it was inconsistent with Dr. X's view.

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Instead, I think everyone got cold feet and thought, "Well, hey, this is still before the courts. Let's just leave the problem with SCAN." The SCAN director—it is only a four- or five-person team—did not know anything about the case. She did not know what her own staff had done. She saw this for the first time and thought probably a fairer process was, "Let's get all the doctors together and thrash it out."

Dr. X would not appear without a lawyer at a hospital meeting. Another key doctor just said, "I am not changing my mind, nothing is going to change my mind, I am not coming to the meeting." So the process ran into heavy going.

At the same time, we wondered why we had not been advised. We knew the time of the meeting; we wondered, "Well, where is the meeting so we can come and give our perspective?" We were told, "Oh, parents don't come to these things." We were saying, "Are you saying that we cannot come?" They said, "Well, yes." When we protested, it was cancelled and that was the end of the complaint process.

Mr. Philip: So essentially, there was no internal investigation.

Mr. C. Campbell: Zero.

Mr. Philip: I am sure we will be told that there are elected boards of governors of hospitals that people can appeal to. Do I take it that this never made it up the line to the board of governors?

Mr. C. Campbell: This is something we hope to do. The hospital in question has an illustrious board. It is probably the most illustrious board of any institution in the country, and I have some confidence.

Mr. Philip: I guess your case points, in the case of both the hospitals and the children's aid societies, to my critical concern—the concern I am most concerned about, I guess, in any of these—and that is whoever collects the information. If they are not completely independent, you can have the most impartial board of governors or adjudicators, but it depends on who collects the information and that is the key. Even the advocacy system, because of its bias in favour of the patient, is not an independent information collector, whereas the Ombudsman is.

Mr. C. Campbell: If Dr. X knows he made a mistake—and all he had to do was read the file to find there were serious problems with the theory he was putting forward, and that is apart from the fact of just sitting down with the two of us. You are supposed to run through a checklist for what are the indicators of abusing parents. You can ask them about their socioeconomic situation or whether either of them had been abused as a child or whether one is an alcoholic or whatever. There are many, many things you look at.

We have a completely clean slate. Maybe that is unusual, but we thought at least that was in our favour. On the face of things, they would at least inquire further, talk to our friends, etc.

But for this doctor—and I think he may know he made a mistake—because he is an expert, there is no incentive for him to go back and say, "Gosh, I goofed," because that is his reputation that he is tarnishing himself. It is better to brazen it out. It is our impression that he was to a certain extent pushing the children's aid to force this issue for the sake of his reputation, perhaps.

Mr. Philip: One last question. You are very articulate, sophisticated people. What do you think would have happened had you been a new immigrant family that did not speak English all that well and did not have \$10,000 to spend on good legal counsel? Do you think you would have your daughter with you right now?

Mrs. L. Campbell: I would like to answer that. It is something we thought about all throughout this whole process. It was confusing enough, the legal language, family law, and we had to become instant amateur experts in shaken child syndrome, medical terminology, legal terminology and the whole court process, and we did not know what was happening to us. We have talked

about that quite a number of times. What would you do if you did not understand the language and you did not have at least some money set aside? I think we were treated horribly by children's aid, and I would suspect that if you did not speak the language and if you did not have any sophistication or whatever, you would be a lot worse off.

Mr. C. Campbell: They would eat you alive.

Mrs. L. Campbell: Yes, they would just eat you alive in the court process. Your child would remain in a foster home for a longer period of time, you would have more intrusions and a longer period of supervision and maybe your name would end up on an abuse list somewhere.

Mr. C. Campbell: Your only chance would be that a judge would act for you. These people are not fools. There is a lot of stuff in the media about the judiciary, but we have gained a great deal of respect for these people, who hear the same things over and over again. It is a very one-sided process, but the judge is the last backstop. We were very lucky, I feel, that at least the judges in this case did look at what was presented and thought very hard about it.

Mr. Philip: We are very lucky you came. Thank you.

Mr. Pollock: We all know there is that common bond in communities. Do you feel there is a common bond—some people would call it a clique—among the doctor, the children's aid society and the day care? Do you feel you were fighting a kind of clique there?

Mr. C. Campbell: Between the doctor and the people he was dealing with at children's aid, yes, particularly the supervisory people. We cannot prove that, but there were things happening throughout this court process. The thing was moving forward, we felt, without reason for it to move forward. We felt he was pushing, as I said, for the sake of his own reputation.

Mr. Pollock: Yes, and possibly he had dealt with the children's aid society before. Therefore, these two groups, the doctor and the children's aid society, were quite comfortable working with each other.

Mr. C. Campbell: They were very close.

Mr. Pollock: Yet there was no outside investigation there.

Mr. C. Campbell: The exception here are the children's aid society's own doctors, who are sceptical and did review things. They went back to the beginning and went through everything and weighed the evidence, despite what the people who run CAS were saying.

There is a kind of dogma, I think, that sets in, or has set in of late, that parents are always guilty, invariably. The pendulum has swung from maybe 10 years ago, when parents were never guilty and a lot of children went back and were further abused. That dogma gets in the way of weighing the factual evidence. The doctors at children's aid really did attempt that, we felt, despite what Dr. X was advocating.

Mr. Pollock: You suggested that the Ombudsman expand jurisdiction over the children's aid. Do you think the Ombudsman should also expand jurisdiction over day care centres? There seems to have been a lot in the media lately about some of the abuse that is taking place in day care centres.

Mr. C. Campbell: What better resource is there for any country than our children? What should we take more pains over? We had the normal attitude that I think a lot of young couples have: We figured that after checking references and looking at this day care situation—which was unlicensed, mind you; for up to five children in a person's home, you do not have to have any government supervision—that things were OK and would be OK. We got very, very badly burned, obviously. I do not think there can be too much oversight over that kind of situation, because the penalties when this kind of situation goes wrong are intensive care wards full of battered children. It happens every day.

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When Elizabeth was in intensive care, there was another child brought in, I think just the same day. That child died in intensive care. It was just a few beds down. Feelings were running very high, obviously, in that intensive care ward. It is extremely upsetting to see this happen. The circumstances are always different.

So to answer your question briefly, yes, any oversight over day care centres has to be for the better.

Mr. Lupusella: I was planning to pass, but I have a question that I would like to bring to your attention. I think at the end of your presentation you emphasized the fact that the children's aid society has the resources and legal people to look after cases and present these cases before the court. It is maintained by taxpayers' money.

Considering the questions that were raised by Mr. Carrothers on the expanding role of the Ombudsman, and considering that the case is before the court, besides the infrastructure that is going to be set up on the basis of the premise of investigating the case and so on, if the CAS is relying on taxpayers' money, the only recommendation it can make in the case is compensation for victims such as you.

What kind of justice are you going to get from this expanding jurisdiction besides the compensation that will eventually be suggested by the Ombudsman?

Mr. C. Campbell: I was not thinking of the Ombudsman acting along those lines particularly. I think the point was made, and made well, that at the end of the day some agency, whether it is the Ombudsman or whether it is a team at the Ministry of Community and Social Services, is going to have the power to look at everything and bring everything to light. That tends to concentrate the minds of some of these people who are taking precipitate actions that there will be scrutiny eventually. You have to justify things very carefully. It is a check and a balance that could be introduced into the system that is not presently there.

The same sort of rationale applies to freedom-of-information legislation. Openness has a salutary effect on administration. We said to the case worker that we would like to bring everything into the light. This alarmed them. I think gradually we made the impression upon these people that we really had nothing to fear from everything being brought forward. Before Elizabeth was even apprehended, we appreciated the fact that they had a job to do, and a very difficult job.

We phoned them and said: "You will probably be wanting to talk to us. We are in this ward in the hospital at our daughter's bedside. Come and talk to

us. Investigate all you like. We know you have a job to do, but make the process fair." You never think things are going to go totally off the rails, but we did not dream that we would end up in all these months of court action and being focused on the way we have been.

Sure, scrutiny, exposure and making things public, whether it is of the Ombudsman or anyone else, further the cause of natural justice.

Mr. Lupusella: But since you agree with me that eventually part of the blame lies on the court system because the court is the right and natural forum where all the evidence is presented before a judge and a decision has to be made based on the evidence presented before the judge. So I might be inclined to agree with you that eventually an injustice was committed through the system, by the children's aid society, or the investigating role of the police or you name it.

All of these facts have been presented before the court. Why do we need the Ombudsman to review again all of these facts when, if you are not happy about a court's decision, a single member of the Legislature can write a letter to the Attorney General to review a court's decision and pinpoint the inequities of the case which have been submitted before the judge? Why do we need the Ombudsman who might make a simple recommendation that compensation is appropriate or not appropriate?

Mr. Campbell: That is a very big question. Let me just deal with it, by talking about the specifics of what we went through. That was that although at a pre-trial hearing a judge indicated what he would conclude if he reviewed everything—and it is couched in the form of advice to all parties—that was not a decision of the court. What happened to us was, we felt, a kind of frivolous prosecution. We were thrown into this process. It went a certain way and they stopped short of a place where actual decisions could be made, and that would be a trial. As such, there are no costs awarded, nothing is really decided, we are out a lot of money and hundreds and hundreds of hours of time and the CAS can walk away not having to admit that it really made a mistake even initiating all of this.

We think that is why it did not go to a full trial because I think certain people in the children's aid saw the writing was on the wall. I think their lawyers felt this was looking very, very dire for them and for the image of the society and that a loss in court would be something of a scandal; so everything just ground to a halt and there was no chance to decide or award costs or anything.

Mr. Chairman: Mrs. Meslin wanted to make some comment on that.

Mrs. Meslin: I just wanted to make one correction, that is, that the Ombudsman can do much more than just recommend compensation. He can do something the courts do not do, that is, look at the administrative process and make recommendations to change that process within the administration of the CAS, for instance, if we had that jurisdiction. The courts would not. They have to find on the evidence and they would not examine the administrative process to determine whether it was good or bad, right or wrong. The Ombudsman would.

Mr. Lupusella: I understand your point of view, but why do we need the Ombudsman to take over the role of the politicians to make changes within the system. I cannot reconcile this principle. We are legislators, we are politicians and we are the ones who are supposed to make changes within the

system to cover inequities of the law, administration and everything. Why do we need the watchdog to tell us what to do? I cannot reconcile this principle.

Mrs. Meslin: As far as we are concerned, we do not for a moment usurp your position at all. I agree completely. Your position is supreme. You are the elected representatives. We have found, though, that there are many issues and many situations where the elected representative cannot have the time, is unable to have the staffing and the background to look into an investigation and he or she refers it to the Ombudsman for us to do. We work in tandem, or we hope we work in tandem, with members. We certainly would never presume to usurp their position in any case.

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Mr. Lupusella: I get this feeling that the Ombudsman is really trying to take over the role of politicians and our mandate to make legislative changes and to improve the administration.

Going back to the point I was trying to bring to your attention, I am sorry if I missed part of your presentation, but I was around to hear the conclusion. It appears that in the course of your presentation you pinpointed the CAS. I am not for a moment defending the role of the CAS, but to reconcile another principle which I presented to you previously, when you appeared before the police to bring the material which you just showed to us, to pinpoint the fact that they did not make a proper investigation, why did you not go to your local member to write a letter to the Solicitor General to complain about the investigative role of the police?

Mr. Campbell: I find it hard to fault the police. First of all, they have to rely on physicians to be forthcoming with information. Furthermore, we were asked, "Do not make waves while an investigation goes on." It is difficult enough to conduct an investigation without all kinds of people getting up in arms and possibly shredding files. You want to go in and examine files wherever, in a hospital or a children's aid office or what have you.

I think the police department involved was a bit embarrassed about some of what had gone on. We bear them no malice because they were misled. They were not given what they needed to do their job. By the time they did get everything, it was very long after the fact. The fact of the matter is very few allegations of this kind are going to result in charges being laid, much less something coming to trial. This looks like the situation in our instance.

Mr. Lupusella: There was an important element in that the baby-sitter was not questioned at all by the police. That is what I read.

Mr. Campbell: I am sorry, the baby-sitter was questioned.

Mr. Lupusella: Was questioned later or at the very beginning?

Mr. Campbell: A bit cursorily, we felt. You have to know what questions to ask and that has to be based on medical evidence. I said in here that the police had been told by Dr. X that it was extremely unlikely, and those were their words in their police report. The detective who originally investigated this case told me, "But Dr. X said it was impossible the sitter could be guilty." He was astonished when he found there were all kinds of key information implicating the sitter that had never been shown to him. There was a lot of water under the bridge at that point and it was difficult to get things going. So it is hard for us to be upset with the police about this.

Mr. Lupusella: How would the Ombudsman have changed the course of events?

Madam Chairman: Mr. Lupusella, some of your questions, unfortunately, were asked in your absence, I believe, and were answered.

Mr. Lupusella: OK, I withdraw. I pass my role to somebody else.

Mr. Elliot: I would like to make a supplementary comment along the lines my colleague has been pursuing here. In doing this, I would like to thank you again for your presentation. I think I led off and did thank you already, but you have been very patient in your answers and very lucid and very articulate. I appreciate that too because of the line of questioning that has just been pursued, in the sense that you are constituents of our colleague Dr. Henderson, and the frustration he shared with you in your case is a frustration I share with some of my cases.

The involvement of the Ombudsman's office in those cases is probably the strongest thing that you will bring to arguments that I have in mind to expanding the jurisdiction. We just do not have the capability as MPPs to do the kind of investigation that the Office of the Ombudsman may do from an individual case point of view, unless that jurisdiction and that opportunity are there. There are other situations such as your own, and you are articulate and can fight your battle, but the kinds of people who come to me often are not nearly as articulate and I think they just get snowed under by the bureaucracy. This is what these discussions are all about.

While Mr. Lupusella was fairly critical of the Ombudsman's jurisdiction being expanded, rest assured that some of the rest of us, because of the way you have answered those questions, are thoroughly reinforced in our commitment to try to do something for the individuals who are maligned by the bureaucracy.

I would like to conclude by thanking you very much again for being here, taking the time and having the patience to answer as well as you have.

Madam Chairman: Thank you for coming before us today.

We will recess until two o'clock. The Ontario Association of Children's Aid Societies will be with us at that time.

The committee recessed at 12:17 p.m.

STANDING COMMITTEE ON THE OMBUDSMAN
EXPANSION OF OMBUDSMAN'S JURISDICTION
TUESDAY, AUGUST 23, 1988
Afternoon Sitting.



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Elliot, R. Walter (Halton North L)
Bossy, Maurice L. (Chatham-Kent L)
Bryden, Marion (Beaches-Woodbine NDP)
Carrothers, Douglas A. (Oakville South L)
Henderson, D. James (Etobicoke-Humber L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
Mackenzie, Bob (Hamilton East NDP)
McLean, Allan K. (Simcoe East PC)
Pollock, Jim (Hastings-Peterborough PC)

Substitutions:

Harris, Michael D. (Nipissing PC) for Mr. McLean
McClelland, Carman (Brampton North L) for Mr. MacDonald
Philip, Ed (Etobicoke-Rexdale NDP) for Mr. Mackenzie

Clerk: Carrozza, Franco

Staff:

Wilson, Jennifer, Research Officer, Legislative Research Service

Witnesses:

From the Ontario Association of Children's Aid Societies:

Caldwell, George, Executive Director
Vollmershausen, Joan, President
Genereux, Anne, Manager, Accreditation and Legal Support

From the Office of the Ombudsman:

Meslin, Eleanor, Executive Director
Zacks, Michael, General Counsel

AFTERNOON SITTING

The committee resumed at 2:07 p.m. in committee room 1.

Madam Chairman: If we can just deal with a matter before we recommence today, the committee will recall that last Thursday morning Gary Munroe appeared before us. At the time of appearing before us, he left with us some number of tapes. I think it was 24 in all that he left us with, but we do have each and every one of them.

Although there was no decision made at the time, Mr. Munroe did ask that these tapes be transcribed. We did not make any commitment to do that, but I did commit to copying them and retaining them on file.

We have now received an estimate that the minimum cost to transcribe the tapes would be at least \$1,000 for transcription and some of the tapes are indecipherable and would therefore be very difficult to get an intelligent transcription of.

I need direction from the committee on this as to whether duplicating them would be sufficient or if members feel there is any requirement for transcription of the tapes. Does anyone feel that transcription of the tapes would be a necessary element of his presentation that we make available?

Mr. Bossy: I just have a question concerning the tapes. Is each tape identified by some wording on it?

Clerk of the Committee: Not all of them, no.

Mr. Bossy: Nothing whatsoever, no identification.

Clerk of the Committee: No.

Mr. Philip: Whose transcript do we not have?

Madam Chairman: The actual tapes that he presented to us, 24 in all, on Thursday. Were you here on Thursday?

Mr. Philip: I am sorry, that was the day I was in London.

Madam Chairman: We had an individual come before us. He made a presentation and was here for an hour, but he had conversations he had taped that were contained in these tapes and he gave them to us as documentation. I told him we would copy them and return the set to him. However, in passing, he asked that we transcribe them or made some suggestion that we would transcribe them.

Now that I have investigated the cost and also the fact that they really are virtually indecipherable in terms of transcription purposes, or some portions of them are, unless anybody feels that is absolutely necessary, I would not order the transcription of them.

Mr. Elliot: My recollection of the testimony by Mr. Munroe was that the transcription was more or less a demand, based on his presentation. As I recall it, you did not commit yourself, other than to copy the tapes and get them back to him, so I think they should be copied and sent back, and no further action should be taken.

The reason I say this is I cannot see, on the basis of the 40 minutes of presentation, that other than for treating the testimony in the context of expanding the jurisdiction, that having a transcript of what would be in those tapes—because I think that he articulated the intent of what his concern was reasonably well in his presentation—would be of any value to us as a committee.

Madam Chairman: That was my feeling. Does anybody object to that course of action—just copying them and returning them?

Mr. Pollock: I do not object to that.

Madam Chairman: Then we will proceed with that.

We have before us today the Ontario Association of Children's Aid Societies. Before us we have Anne Genereux, manager of accreditation and legal support; George Caldwell, executive director; and Joan Vollmershausen, president.

I understand that you have had the expanded jurisdiction paper from the Ombudsman. We would appreciate it, if you have some opening remarks, which I believe you do, if you would consider leaving some time for the committee to ask some questions.

ONTARIO ASSOCIATION OF CHILDREN'S AID SOCIETIES

Mr. Caldwell: We have circulated to you in the yellow folders some useful material as background to our presentation. It is not our intention to read all of this material at this time but rather to highlight three or four major issues so that we would leave the maximum amount of time for questions and debate and discussion with you.

Our president will make an opening comment. This will be followed by Mrs. Genereux and then by myself.

Mrs. Vollmershausen: The Ontario Association of Children's Aid Societies is pleased to appear before this committee to present its response to the position paper of the Ombudsman to expand his jurisdiction to include children's aid societies.

The association has prepared a written response which has been provided to you. It includes two examples of complaints procedures and an appendix outlining the use of the complaints procedure by clients to date. We will provide a brief overview of our response and then welcome your questions.

The response of the association is to ask this committee to decline the Ombudsman's proposal to expand his jurisdiction to include children's aid societies. Each of the 54 children's aid societies in this province is a separate, autonomous, incorporated organization within the requirements of the Corporations Act and the Child and Family Services Act. Each society develops and administers programs that address the needs of the community in which it functions.

The first children's aid society was incorporated in Toronto in 1891. The most recent one is a native agency which was incorporated in Rainy River in 1987. The societies have continued throughout the 98 years they have existed to adjust to increasingly restrictive legislation and increasingly complex social problems for the children in our society.

Mrs. Genereux: What I want to highlight are the current review processes in effect under the Child and Family Services Act or within the realm of the children's aid society. I will provide a brief outline of the existing review processes, but before I do so, I think it is important to determine what a review or redress process is meant to do. It is our belief that such processes are meant to assist the client, improve the service and/or assure a better accountability.

The following processes currently are in place:

Under part III are the courts. When you review the requirements in part III which apply only to children's aid societies, there are a number of requirements, both for first accessing the court process and for reviews. They also include a provision for third-party access to the courts.

We have the program supervisors, given authority under sections 6 and 17, who review and supervise all approved agencies and other services that are provided under the Ministry of Community and Social Services.

There are the exceptional circumstances reviews, which are conducted by the Ministry of Community and Social Services, to address financial issues.

There are the child welfare reviews, which are also provided to address financial estimates and projections. Requirements for those reviews are under subsection 20(3) and section 21 of the regulations.

The Ministry of Community and Social Services conducts comprehensive audits. These audits, which usually take anywhere from four to eight weeks within any given agency, review management, finances and service provision in a detailed form within the given agency.

Children's aid societies are also approved agencies, as shown under subsection 10(2) and sections 22 and 23, and there are review mechanisms as between agencies and the ministry.

There is the expunction hearing, which is provided for under subsection 72(4), in relation to registration of a client's name on the child abuse register.

There is also a provision, under section 63, relating to a specific child or the administration, under part III, where a judge may be appointed to investigate.

A residential placement advisory committee is organized under section 34. It reviews a child's placement.

Crown ward reviews, which are provided for under section 62, do annual reviews of the work being done with and the planning for crown wards.

Child abuse review teams, provided under section 69, must review one particular type of situation around abuse and placement of a child and, in a number of situations throughout the province, do review a large number of abuse situations that arise in any given society.

Review teams under the extraordinary measures sections, 123 and 127, apply to secure isolation and prohibited procedures. These, while they do not necessarily apply specifically to each and every society, are still issues we must deal with when we are dealing with particular children.

Sections 138 and 139 deal with adoption placement reviews.

Another type of review that occurs is under the Child and Family Services Review Board. The board has substantially expanded jurisdiction under the Child and Family Services Act and has the authority to review a child's placement under sections 35 and 36 at the instance of the child, has the right to review issues around confidentiality and recording under section 171 at the instance of the client and also has licensing review powers under sections 180 and 181.

There is also the Custody Review Board under section 92, which reviews issues of placement and temporary release for young offenders. Again, while they are not necessarily all related to children's aid societies, since children who are wards of the system remain wards of the society even while they are in the young offenders stream, this is another review process with which the societies have had involvement.

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The office of child and family service advocacy under section 98 is a service which is accessible directly by a child or a parent for any issue in relation to services sought or provided. There is also the review procedure under sections 105 and 106, which relates to complaints by or on behalf of a child in a residential setting and provides for a further review to a person appointed by the minister.

There is the review procedure under section 64, which I know you have discussed at some length with ministry personnel. Those are available and are outlined. I have provided two examples of those, which are fairly standard throughout the province. The materials are provided to clients, to foster parents, often to other service providers and to children. So it is a widely accessible procedure.

Basically, those give an outline, a very quick thumbnail sketch, of the procedures that are available to scrutinize the work that children's aid societies do currently.

Mr. Caldwell: As we try to present the position of the Ontario association, I think it should be clear that we are currently subject to 18 different kinds of review. Therefore, we believe the opportunity exists in our system for very adequate and appropriate approaches on the part of a child or on the part of a client. I think it should be remembered that we deal with the involuntary client.

By and large, in the 89,000 investigations we do each year, in the cases we serve, with the exception of adoption or foster parent applications, we are dealing with individuals who have been referred to us by the police, by the school, by neighbours for an offence of some kind that they believe has occurred against a child. Therefore, it must be remembered that in our system it is appropriate for us to have as many reviews as we have.

If there is a tradeoff between having the Ombudsman's office as a single reviewing agent and our dispensing with 18 reviews, we would be very happy to have the Ombudsman's office do all of the reviews for us. Then we would have one organization, one party doing the review. But this would be up to the committee. The thing we do not want is to have another review on top of all of the reviews we currently have. We have not mentioned them all because the association also is almost a court of last appeal in some cases.

Probably in the run of a month, we handle four or five fairly major kinds of complaints. It is important to realize how quickly a system can be distorted. We are not in custody dispute matters, settling whether the husband or the wife should have custody. That is a matter for the court, unless there is an issue of child neglect involved. What has happened repeatedly is that one of the parents attempts to involve the children's aid society by making accusations against the other parent. What has been a love situation turns into a very despicable hate situation; so you have the wives accusing their husbands of sexual intimacies with their children and attempting to use us as the force involved in obtaining custody of the children.

Our position is based on the number of reviews that the children's aid societies have at the present time. But also as we listen to the testimony and read the concerns of our good friend the Ombudsman, he is concerned about the test of the best interests of the child.

It may be that his report was written in 1986 and he did not have access to the preamble to Bill 77, the Act respecting the Protection and Well-being of Children and their Families, but the whole premise, as you legislators know, is the best interests of the child. That is what that act is set up for.

There are no reviews that are independent of children's aid societies, and Indian and native children are not receiving adequate service that is culturally appropriate. This is what the Ombudsman was saying in his report.

Having the Ombudsman obtain jurisdiction with respect to children's aid societies would have considerable impact, we suggest, on individuals and on the system as a whole. The effect would occur whether or not the Ombudsman makes recommendations in relation to societies. The current review processes require a great deal of work by society staff and the front-line social worker in particular.

This is of eminent concern to us because there is simply one additional cost in the implementation of a Child and Family Services Act. We, in the association have completed a cost-implication survey with respect to the Child and Family Services Act, with its 18 reviews, and found that there were a number of commonalities of cost among the member societies.

We found, for example, that this act, which was to be a no-cost act—and those of you who sat in the Legislature at the time were told that it would be a no-cost act—in fact has cost us \$11.7 million to implement. The major impact of the legislation has been the additional administrative work that must be done by the front-line social workers.

These are the people we are most concerned with who have the face-to-face, direct contact with the client. We have approached the ministry and asked for additional funding. Those of you who are familiar at the moment with government funding realize that this is a very tight period of time in which to get additional funding for any purpose from government.

Whatever new processes may be introduced into the child welfare system must be, among other things, cost-effective and must provide a process or avenue that is not already in existence. Given the number of redress provisions that are presently available under the Child and Family Services Act in relation to children's aid societies, it is difficult for us to imagine another mechanism and how this would assist the clients further or improve the service or assure better public accountability.

Rather than take more time, I know you have questions.

Madam Chairman: I just want to say how much we appreciate your presentation. I have just had a chance to quickly review it, but it seems very thorough and helpful.

Mr. McClelland: I have not had, and do not profess to have, a great working knowledge of the entire system, if I can use that word in a global sense, and all of the reviews that are outlined and referred to in your submission. Of course, I too, would join on behalf of my colleagues here and thank you and those with you for your presentation here today.

It seems to me, though, on a quick review of these 18, that many of them are ongoing reviews in terms of process and procedure, just as I look at them. I just want to begin to break some of these down. You look at the exceptional circumstances review, number 3, which is primarily funding.

There is child welfare reviews, funding and comprehensive audit funding. I think what we are looking at, and I am not suggesting that they are all of that nature, is the fact that we have to be very careful when we talk about 18 reviews. Many of them are delivery-of-service-oriented. Some of them are funding-oriented. Obviously, by virtue of the interaction of funding services, there is overlap. I think our concern, and what we want to investigate, is for those people who are brought in tangentially and who are in your services primarily directed to the service of children, and there are other people involved.

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I will be very candid with you. We heard a story this morning about people who have been brought into the system by virtue of you, the children's aid society generally, seeking to fulfil their mandate, and I am certain with the best intent and goodwill. Anybody in your profession or the professional staff who work with you would have goodwill and best intent at heart.

Inevitably, being human, and the very fact that we all make mistakes—mistakes do happen sometimes, people are caught up in a system where basically they are found to be overpowered. A number of forces come to play in their lives and they can get caught up in a system that tends to overwhelm them.

The thing that we are talking about, with respect, is an outside-looking-in process rather than an ongoing process that gives people the opportunity of a last resource of help in a situation where they feel that they are being caught up in the process. Having spent a number of years in the area of social services, and I do not say this in a disrespectful sense in any way, I would say to you too there is a certain sense where people within the profession and related services tend to approach allegations and investigations with a sense of, as we say in the legal profession, legalese or socialese—a certain skewed approach, and I say that respectfully, or a predetermination.

I know this is sort of a preamble and I apologize for that. I am asking for your reaction to the suggestion that from time to time, not in every case but in exceptional circumstances, it behooves not only our society generally, for the sake of individuals who may be victims or caught up in the process, but yourselves as well, to know that there is an independent, arm's-length agency that can come and take a look from the outside. From time to time those

exceptional circumstances effectively ensure your clean bill of health. It seems to me if I were in your position, notwithstanding your arguments of interference and the problems you may face, that I would welcome the opportunity for people to come in from time to time to give me an extra checkup so to speak.

Regardless of what profession or pursuits in which we have engaged in the past, I think all of us have a tendency to get caught up in what we do and find it very difficult to step back and see the forest for the trees. I suggest to you, without making it simplistic, that is the role the Ombudsman is contemplating: to have the ability to stand back as an outsider, if you will. Almost all of these reviews are by people within the social services delivery system to one degree or another who have, I do not want to say a vested interest, because certainly there are some adversarial or checks and balances built into it, a common element running through them, that of being involved on an ongoing basis, day to day, week to week, a livelihood dependent upon the delivery of a social service network in our province.

Having said all that I realize that I have perhaps gone on at perhaps too great a length, for our consideration, but I put to you for your consideration, is there not some value from even your point of view in being able to give that sense of assurance that somebody from the outside, from time to time, is there to back up our system?

Mr. Caldwell: That is a marvelous question. I will take a moment to try to understand which way I should attempt to reply. First, I do not disagree for a moment with the value of review, as I said at the beginning. I think I did raise the whole question of whether we could reduce the numbers of reviews that have been added with the 1986 legislation, which is a bit of overkill and, therefore, have the arm's-length situation that you propose or suggest might be considered for the Ombudsman. What I am afraid of is adding to what we already have.

Second, I think the courts, in the first instance, are a forum of accountability. One would assume that children's aid societies—if you listen to some of the people who complain—go and pick children up and gather them into barns, so to speak, and have no recourse to have to defend this within a few days at a show-cause hearing and later on at a full hearing as to why we took this action. We have to, under the rules of evidence, be able to justify why we have intervened.

With an act that stresses the least intrusive approach, when we pick up a child, we had better be able to justify before a judge in our legal system, which is independent from the children's aid society, obviously, that we have acted in the best interests of the child and in the protection of the child and that there was evidence present.

I think the kind of outside checkup that has also been available has certainly been the media and the press. People have had that access for a long time and have used it at times, if I might say, against us in the way in which they have gone forward to the press with stories that have been half truths, forgetting to give the salient facts of the situation.

We have been stupid at times, I believe, in terms of protecting the best interests of the child. I say "stupid" advisedly, in the sense that we have not been able to protect our service enough by protecting those clients who have gone to the media with half the story and gotten all kinds of sympathy, or gone to politicians and gotten all kinds of sympathy by telling half the

story. It has been very difficult for us to put a face on it at times.

I must say though that over the last few years, the media have been more than fair with the societies. But when you mix up children, violence and sex, you have things that are irresistible in terms of stories. So you get this impression that the children's aid societies are running rampant.

I agree with you that a number of the review hearings are review hearings that involve money, but the exceptional-circumstance review—and I was involved in a child welfare review last week, representing a society—is a necessary kind of demonstration that things are exceptional in volume, that the kids who are coming into care get the money to pay for the board, the foster care, etc. that is involved.

I think there is always the danger of socializese. I did not get that really. "Legalese" I know, but "socializese" was a good one. That is a coined one. I would be afraid though, if there is a demonstration of a predisposition to apprehend children. Why would we want to apprehend more children? Goodness me, we have 10,000 in care on any given day.

Mr. McClelland: I might interject that I did not necessarily mean that. If I implied that, I do apologize. I certainly was not suggesting that there is any conspiracy to go out there and snatch children off the street, and to use your words, hide them in the barn. I will let you continue, but I just wanted to interject that and make it very clear that that was not my intent.

Mr. Caldwell: I appreciate that, but there was the sense that we had a predisposition to do this, or there was a pre-approach, that we had blinkers on. I think there is the widest kind of approach to it.

Mr. McClelland: If I could refocus, let us take it a step further. I am not suggesting there is any predisposition or inclination for you to go out and create work whatsoever. I am saying that once you are in that situation, with all the goodwill and all the professionalism that you and the people involved in the delivery of your service bring to bear in the field, mistakes can be made and are made. That is a fact. I make mistakes daily.

Mr. Caldwell: That is granted.

Mr. McClelland: Having said that, let's clarify. Let's not worry and get into a great deal of rhetoric about a defense that you have been out there sort of waiting in the bushes. I have no predisposition to do that whatsoever.

What I would like to do is constructively examine the question that at some point down the road—let's presume we are already involved in the system. A lot of the groundwork has been laid, you have exercised caution and prudence and the decision has been made to proceed in a particular case. Having said that, at some point down the road, whether it be early in the day in terms of the process or late, there are occasions in which it may be prudent to have the opportunity available for an arm's-length—if I can use that word—examination by somebody who brings to that examination a different perspective, an outsider's look, if you will. That is the question, and I apologize if I gave you the—

Mr. Caldwell: Let me have Mrs. Genereux respond, particularly with

reference to section 64 of the legislation.

Mrs. Genereux: I think there are two particular areas that can and do have an outside look. One is the comprehensive audits, because those, while they are a function to some extent of the audit branch of the ministry, are also conducted by people who are outside of any given agency. They are a very thorough. Program, system, policy, finance, anything that goes on in that agency is examined. The other one is the section-64 complaints procedure. All of those procedures have a director's review as the final step.

I think when the ministry presented its information, it indicated there have been six so far. When they get to that point, the ministry goes outside its own area, outside its own personnel, to appoint somebody who is separate from the societies and the ministry in order to do those reviews. What has happened with those is that if there are recommendations coming from the review, they are sent to the ministry and the society. The society reviews them and advises the ministry what it is prepared to do in response to those recommendations and sets a time frame on those steps it has to take. In both of those instances, you will get somebody outside the system.

I think one of the difficulties in what you are suggesting is that even given the Ombudsman's involvement, should that end up to be the case, every society in the province is not necessarily going to have that outsider's view, as you call it.

One of the things our association is in the process of doing is developing a system of accreditation in order to do some of that type of outsider's review, because at this stage we do not have one within our system, but it is certainly an issue that has been raised a number of times. We are not yet in that position, but we certainly see a need for some ongoing review of each and every society.

Mr. Philip: The outside accreditation, though, would be more in terms of what would probably be a value-for-money audit rather than something that would identify specific problems, would it not?

Mrs. Genereux: Not necessarily. We are looking at standards of practice, we are not looking at financial accountability. The ministry provides a substantial portion of the financial resources for any given children's aid society and it has a very adequate financial accountability system.

Mr. Philip: I guess one of the problems I have with the essential argument you have made is that with the exception of the section 64 reviews, and few ever make it that far, it is the equivalent of a ministry saying, "We've got internal audits, therefore we do not need an auditor general." I have difficulty with that. Can you tell me why you should be different from other agencies and ministries that are subject to the little guy who does not know his way through 18 different types of reviews, many of which have nothing to do with individual cases, but rather deal with processes or structures?

Can you tell me why you should be any different from the Ministry of Natural Resources, which may be working in the same area, with the same native people, when a person has a complaint? Why should you be different when you are dealing with something which would perhaps be more important to a family than its fishing rights, namely, its child? Why should you be exempt from that kind of independent review? If I can have my fishing rights reviewed by the Ombudsman, why can I not have what is happening to my child reviewed?

Mr. Caldwell: I will begin the answer, Mr. Philip, with the fact that as the president indicated, we have established over the past 100 years a unique system in Ontario of voluntary private children's aid societies. Because we have boards of directors that are made up of the local citizenry, the public, individuals who are aggrieved can go directly to a board of directors in a community, and they do. They can go, of course, to the procedures that are established in the agencies. We may find those to be rather bureaucratic—I suppose one could use that term—but we are not an agency in the sense of the ministry.

We are operated by a private board of governors, directors, under the Corporations Act, and I suggest that if we want to follow Alberta or British Columbia or Saskatchewan and have child welfare delivered by the bureaucracy in the sense of the government, then I suppose your argument holds much weight. Therefore, what would be the difference between the fishing rights under Natural Resources and the complaint a person would have under child welfare? I suggest that is abundantly different. It is different in the sense that this is a private agency.

Now, we get 30 per cent of our funding from the Legislature and I agree that is a very significant amount, but we also get 50 per cent from the federal government and 20 per cent from the municipal government, and we have private funds. So I would reject the argument that we are government in the sense you are using.

Mr. Philip: I do not accept the fact that because you get only 30 per cent, somehow that has any influence on the jurisdiction. Certainly, the analogous situation is that the Provincial Auditor goes in and examines corporations and has had inquiries into corporations to which moneys are transferred that are private or nonprofit corporations. I do not think you are any different in that sense. He is protecting the taxpayer; the Ombudsman protects the civil liberties side of the equation.

You talked about the board of directors, but the fact is that when you look at this sheet you have handed out to us, very few of those have actually gone all the way up to the board of directors. Most are in fact dealt with by the supervisor. As I look down the list of complaints, certainly in Halton, 12 out of the 23 were handled at the supervisor level and then at the executive director level.

My question to you is this: even if it gets to the board of directors, where is the information collected? Who collects the information on which that board makes the decision?

Mrs. Genereux: The board can collect it from any source it sees fit. Some boards have hearings. Some have committees of the board that actually have a hearing, because they believe that a board as a whole would be too intimidating to a client. Some of them ask for written information and will take whatever the client provides, whether it is written or not, and a few of them have had some input by tape because the person was not able or felt unprepared to provide a written piece for the board. So it varies a fair bit.

One of the reasons not many have reached either the board or the ministry level is that the issue has been resolved at a lower level, and certainly for provision of service, particularly in a nonvoluntary agency, being able to resolve an issue at that level means you can provide a much better service to that client if you are not feeling you are constantly in an adversarial position with the client.

Mr. Philip: I guess one of the concerns I have is that, as MPPs, all of us here deal with various voluntary boards, and by and large, even in my riding where there is a large percentage of new Canadians, working people, the boards are made up of upper-middle-class people, and none of them, in my experience with very few exceptions, are trained in investigative techniques. I really wonder how well a board can judge if most of the information that is presented to it, and I suggest this is the case, is collected by the very people it is passing judgement on. They may make an objective decision based on the information they get, but I really wonder how biased that information that filters up to them may in fact be.

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It seems to me that if you are going to have objectivity, you have to have it at the investigation stages and I have not heard anything today, and certainly in the case we heard earlier we did not have any reason to believe, that the information running up the line was necessarily collected by someone who was trained in investigative techniques the way the Ombudsman people are, or the way a police officer would be trained in order to collect information objectively.

Mrs. Genereux: I think one of the errors in your presumption is that the majority of boards are upper-middle-class people. It may be more prevalent in the large metropolitan areas, but certainly in the vast majority of children's aid societies, we are not necessarily looking at those people as being the only board members.

The other part you are referring to is that—

Mr. Philip: Could I stop you on that?

Mrs. Genereux: Yes.

Mr. Philip: Can you name one? Can you tell me then, are there people who do not speak English very well on any of your boards?

Mrs. Genereux: I would not pretend to know all the board members within the province.

Mr. Philip: Can you tell me whether there would be anybody who lives in public housing who is on one of your boards?

Mrs. Genereux: Yes, I know of one person because I happen to know that board. That does not mean there are not others, but I can think of one in particular.

Mr. Caldwell: The business, for example, of the Plantagenet society is conducted in French. The society in Kapuskasing conducts its business bilingually, so we have this aspect, but what I find most upsetting—

Mr. Philip: Conducting it in French, in the native language of the majority of the people in the city, is hardly dealing with an immigrant population. French Canadians immigrated before my ancestors did. They are not quite in the same category as some of the more recent arrivals.

Mrs. Vollmershausen: I would like to say that in the county that I represent, we did have a cross-section of people on that board and we did have a complaint from someone in the system while I was president. We had a

document, prepared by the person who had the complaint, given to us; and I felt there was a fair review of that with the board.

Also, I think from any board I have had experience with in the children's aid societies, they try to have a cross-section of people. We have lawyers and labourers, accountants and so on, different sections represented.

Mr. Philip: I interrupted you. Would you answer my question about the investigation techniques and the information that comes up?

Mr. Caldwell: I understood that even the Ombudsman was conceding that he did not have the staff to do the investigations in child welfare. I thought that was part of his 1986 presentation and that he would have to hire specialized staff to do the investigation. Maybe I am wrong.

Mr. Philip: The Ombudsman always hires specialized staff to do investigations; that is part of the Ombudsman's office. What you are doing is conceding the very point I am making, that the Ombudsman has people who are trained in investigative techniques.

Mr. Caldwell: We have people who are trained in investigative techniques in child welfare. We are the experts in doing the investigations in child welfare. I wish you would concede that.

Mr. Philip: In investigating yourself.

Mr. Caldwell: The way you are talking, Mr. Philip, is that we do not have qualified professional staff, and we do.

Mr. Philip: I think there is a difference between being qualified as a professional and being trained in doing investigation work. I think there is quite a difference in that.

Mr. Caldwell: The most highly specialized degree of investigation, I suppose, is the investigations we do in child abuse, and this is where many of the areas of dispute will come.

Mr. Philip: You still have not answered my question with respect to whether or not the investigation in most of these cases is in fact done internally, and whether the information that is provided is provided from inside the very organization on which the board is making that decision, by its own staff people.

Mr. Caldwell: The answer, of course, is yes. As we have indicated in the document we presented, the resolution of the complaints is done internally and the ones that reach the board or reach the ministry or reach the media are a fraction, so I have to answer, yes, of course. One of things we are concerned about is resolving complaints that clients have. We have the complaint procedures, which we have also issued to you, which are done in a number of languages so that clients can have an opportunity, if they feel aggrieved, to come to us.

Mr. Philip: In preparing this paper, did you consult the people who are on the line working in the children's aid societies?

Mrs. Genereux: To some extent, yes. I talked to a variety of people at various levels throughout the agencies.

Mr. Philip: Would you agree that a number of these are unionized under the Ontario Public Service Employees Union?

Mrs. Genereux: There are 35 unions currently in the children's aid societies and three societies that are currently being unionized. All but four of the societies have either a union or an association, and if there is an association, they have a variety of requirements.

Mr. Philip: Are you aware that OPSEU appeared this morning and in fact said that it felt it would be in the interests of its members—we can translate "its members" to your employees—to have the Ombudsman have the investigative powers, because he would not only protect the complainant but also protect the employee from the point of view that if an unfair complaint were made against him, at least once the complaint was resolved in his favour by the Ombudsman, there could be no question that there was a thorough, independent, objective outside inquiry. Are you aware of that testimony and what would your response be to these people, who represent the employees who are working for you?

Mrs. Genereux: I was not aware of their presentation. None of the employees, the front-line workers I spoke to were aware of that position, and certainly they did not support that position, so I cannot—

Mr. Philip: How do you know they did not support the position when you said you talked to only a few people?

Mrs. Genereux: I spoke to someone within all of the children's aid societies that we represent, and the front-line workers whom I spoke to in order to try to determine what they thought it would mean to them to have the Ombudsman included all rejected the idea because they believed it would cause a great deal more administrative work for them. One of the primary complaints they hear from clients now is that they are not receiving enough service or having enough contact with the worker. If the administrative aspect of what they do is increased, then the amount of front-line, face-to-face client work they can do will be substantially reduced.

Mr. Philip: I guess I am puzzled by that, because when you give us the list of complaints, there are very few complaints per children's aid society. Assuming that the Ombudsman would get only a small fraction of those complaints—I assume some of them would be just misinformation and once they came to the supervisor, the questions would be answered—I find it hard to understand how, for example, somebody in Dufferin who had no complaints would feel that suddenly giving the Ombudsman jurisdiction would increase his or her workload. I find it hard to understand how people in the Essex children's aid society, which had only three complaints at all, by your figures, would feel that somehow the Ombudsman would add substantially to his work. Even in Halton you have got only 23. You are hardly talking about a major amount of investigatory work going on if this is in fact the number of complaints that are being received from one children's aid society to another.

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Mrs. Genereux: The complaints procedure, as this document outlines, is not the only one that has added administrative responsibilities to the front-line workers' workload. One of the concerns that has been expressed is that should the Ombudsman have jurisdiction, one of the difficulties or one of the issues will be that the complaints procedures will be given only lipservice, that people will simply proceed to the Ombudsman and the societies

will not have the opportunity to resolve them at the lower level.

One of the primary review processes that is frequently quoted when you are looking at administrative responsibilities is the area of the residential placement advisory committee. The vast majority of children who come into CAS care are at one time or another reviewed by that committee. The front-line CAS workers are finding that a highly administrative process for them, maybe not for the committee itself but for the worker who is preparing the work for the committee. So when you consider adding another level where they would have to be involved in preparing information and documentation, they basically have rejected it as being something more than what they believe they should be doing in this area.

On the other hand, they are not suggesting that the Ombudsman not be involved. But please, if you are going to do that, look at another area in which we can reduce the amount of administrative work for the front-line worker. Do not simply add another layer.

Mr. Philip: I am not sure how the Ombudsman would be involved at the early stages anyway. I do not think he has been asking for that.

Mrs. Genereux: No, but what I said was that people would pay only lipservice to the complaints procedure, for example, and try to go as quickly as possible through it to reach the Ombudsman. I am, at this stage, reflecting the commentary I have heard.

Mr. Philip: I guess I am puzzled since that has not happened elsewhere with the Ombudsman. If somebody gets his problem solved at the first level, why would he want to proceed to a second or third level, since he always stands a chance of having it rejected higher up? It would seem to me that a person wants to have his problem solved as quickly as possible, and if he feels that he has satisfaction at the lower level, it would never proceed to the Ombudsman.

Madam Chairman: Mr Philip, you have been going for just over 20 minutes. Are you prepared to let someone else ask questions?

Mr. Philip: That is fine. They have not convinced me.

Madam Chairman: I noted that.

Mr. Harris: I briefly want to follow up where Mr. Philip was at, and he started to get into it, as to how many complaints based on the data you have given us would actually end up with the Ombudsman. Maybe you could help me too. You say that in Elgin there were four complaints; two were resolved by the executive director, one by the board and one went to the ministry. When it says "Number Completed By," does that mean that was resolved there or that it got there?

Mrs. Genereux: That it was resolved at that level. The one that went to the ministry advocacy office, for example, would have started at the front-line worker level.

Mr. Harris: So of all the ones that add up across your sheet, and most of them do, none would get to the Ombudsman? Presumably they would have to go through the ministry and still not be happy before they would get to the Ombudsman? Is that correct?

Mrs. Genereux: Yes.

Mr. Harris: What about the ones that do not add up across? For example, Brant had 10 complaints; three were resolved by the executive director, one by the ministry and there are six hanging out there somewhere.

Mrs. Genereux: No, the societies track their information differently. They all track the ones that go to the ministry, they all track the ones that go to the board and they all track the ones that are resolved by the executive director. They do not necessarily track whether it has been a supervisor or front-line worker or a department head who may have resolved it. The six that are there may not have been resolved by a supervisor. They simply have a number. They only track up to the executive director level by number.

Mr. Harris: Do you have any idea how many complaints are not resolved after having gone through to the ministry stage?

Mrs. Genereux: No.

Mr. Harris: That is what we are dealing with here. That is where we would like the Ombudsman to become involved, or where the Ombudsman would like to become involved.

Mrs. Genereux: At this point, I do not know. I do not have a clear idea. The Ombudsman's office does get calls from people who are within the children's aid system in one way or another, or in a few instances would like to be. At this point, I am not sure what they do with them and how many those amount to. From the report the Ombudsman put forward in 1986, I do not have a clear sense of how many he believes would come to his office.

I think the primary difficulty for most people I spoke to throughout the province was that whatever information the investigative team or person would need would have to come from the front-line workers and they basically feel they really are not able to deal with more of that kind of work while still trying to do the work that they got into child welfare to do in the first place.

Mr. Harris: I understand that problem, but if the front-line worker had gone through preparing a report for the supervisor, the executive director, and then the board and then the ministry, how much more would he need to be ready to deal with the Ombudsman's office?

Mrs. Genereux: I have no idea. My impression of what the Ombudsman does at this point with other investigations is basically to start from scratch again, so I really do not know.

Mr. Harris: Maybe the Ombudsman's office can tell me from its experience in dealing with others. What would you see involved if you had jurisdiction?

Mrs. Meslin: If you are talking about the front-line worker, I think you are correct, Mr. Harris. In our investigation, although we technically start from square one, we do not say to the front-line worker, "Start from square one." We interview the front-line worker, who by that time, as I think you have tried to say, is fully conversant with the situation from his perspective, and he is the one we interview. We do not ask them to suddenly go back and reinvent the wheel; we ask them questions that relate to the issue, and I assume that by that time they are fully conversant with the issue at hand.

Mr. Harris: Right now, after you are unhappy with the ministry review, if I have a complaint against the children's aid society and I have been through all this, then what can I do now?

Mrs. Genereux: I do not know that there is another avenue. It depends on the issue. Some issues could be taken to court should the client wish to do so, but other than that, I am not sure that there is any other avenue.

Mr. Harris: Given that we heard today something that is increasingly bothering me, not just in children's aid, and that is that only the poor and the rich can get through the court system—

Mrs. Genereux: You mean you and I would not be eligible for legal aid, for example?

Mr. Philip: No, he would not. You might be.

Mr. Harris: I might be as an MPP; I am not sure about you.

The court system is increasingly becoming unavailable to people. It is something we are going to have to come to grips with too, by the way. Let's say the government came to grips with that and it said that, like health services and others, legal services will be a right of living in Canada. We pick up two or three more rights every year that goes along that we did not have the year before. Then everybody would be in the court system.

Would you rather have the Ombudsman after all this, or would you rather be in the court system?

Mr. Caldwell: Mr. Harris, surely a person as knowledgeable as you knows that our clientele are the poor. You have said that the poor and the rich have the legal service available to them. The major cause is poverty, still, in Ontario as to why children come into child protection services. The poor, in your definition, are the persons who do have access, and they use it.

We have just been through, as you are well aware, a case in Hamilton paid for by legal aid that cost us \$500,000. Legal aid may have picked up the others. There were seven lawyers involved for 153 days of hearing. That was not a rich family.

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Mr. Harris: Would it not be cheaper and require less staff time to deal with the Ombudsman?

Mr. Caldwell: The Ombudsman would not even have to get involved. This is a legal matter.

Mrs. Genereux: Even given the examples in the Ombudsman's paper, there are several there that the Ombudsman probably would not ever become involved with because they are court-related. They would have to be dealt with through the courts. Once the court has made a decision, the Ombudsman is not going to investigate that decision. That is not part of his role.

Mr. Harris: If a complaint were brought to the Ombudsman, and it was in court and then the complainants found out, after spending \$50,000 or \$60,000 of their own money through legal bills, that they were indeed right

and proved they were right in court, would the Ombudsman not become involved then?

Mrs. Meslin: We could be.

Mr. Zacks: As you said this morning, if the matter is in the courts, actually before the courts, as a matter of practice, we will not investigate. Sometimes we will on a rare occasion and exceptional circumstances. Once the court process is completed, we have every right at this point to investigate a complaint against an agency over which we have jurisdiction. We often do.

Mrs. Genereux: Even to include whether there should have been an apprehension? That was the essence of one of the examples given.

Mr. Zacks: If we had jurisdiction over children's aid societies and there were an action of a worker for a children's aid society, the Ombudsman would have the right to investigate that complaint and then make recommendations that perhaps the law itself was improper or unjust, or that even the practices and procedures of the children's aid society were unreasonable or unjust. We do that from time to time.

It is a fallacy or a misinterpretation of Ombudsman legislation to say that once a court is involved the Ombudsman has no role. It is not the case at all.

Mrs. Genereux: The other question is what would happen if after going through all of the processes or any one of the processes that may be available, the person is still not satisfied after the ministry and the Ombudsman have been involved? Where do they go?

Mr. Harris: I am glad you asked that because Mr. Philip was alluding to the problem that a complainant has in being sure that whoever is reviewing, whoever is hearing this case does not have a vested interest against that client, against that complainant.

Mrs. Genereux: You are talking about perception as opposed to reality perhaps?

Mr. Harris: I am not going to judge, but I am telling you that is certainly the perception. At that point, there does not seem to be any mechanism—there is with the government agency—with a children's aid society for somebody to feel satisfied that he or she has a truly impartial hearing. I think that is the point Mr. Philip was making—right up to the board hearing. I have sat on enough boards. I have been through it on school boards.

Mr. Caldwell: But the client always has access back for review under the Child and Family Services Act. I am very disturbed by what the Ombudsman's staff is saying. I believe we live in a society where the rule of law is the rule of law not the rule of Ombudsman surely. I wonder where we are going.

Mrs. Genereux: I, too, have some concern if a judge has heard the case—it may have been a lengthy trial—and has decided that the society acted as it should have and apprehended a child. The child is in need of protection and the judge came to a conclusion in any number of ways as to what should occur.

Mr. Harris: What happens if the judge rules that you did not?

Mrs. Genereux: There have been cases where societies have been assessed costs. The courts have been very clear. There is an excellent decision by one judge that indicates that the society has and the workers have certain responsibilities.

Mr. Harris: What happens if after nine months it never gets to court?

Mrs. Genereux: I do not understand how it could never get to court after nine months.

Mr. Harris: In the case we heard this morning, the society finally obviously felt that they had screwed it up long enough and they dropped it after nine months.

Mrs. Genereux: Most judges these days will not permit the societies simply to withdraw a matter without a full explanation of why. I did not hear what went on this morning, so I cannot discuss that, but the judges have been very clear as to responsibilities of workers and societies and what they can and cannot do in terms of apprehension and bringing children into care.

Mr. Harris: I had better pass to those who are going to be here when this actual decision is made. I am just in for the day.

Mr. Elliot: I would like to go at this from a little bit different point of view, but before I do that, I have been a little bit bothered by the apparently antagonistic dialogue among a number of the questioners and yourselves. I think you, as representatives of the children's aid societies province-wide, are being a little bit too defensive because, in my view, the 54 societies have done an excellent job.

I think this is best exemplified by the fact that I am sure that in 1891, when the first one started in Toronto, the 18 review processes were not in place, and slowly over the years they have been built up. I think that was done because of a real, conscious concern for the individual kids who were being disadvantaged in our society; so I think you should be very proud about the fact that there is a good record by the children's aid societies out there.

I would like to come at this from a little bit different point of view. In your capacity as societies, you are the advocates of the children and you go to bat consistently for one part of what is not always just one individual. In the case we heard this morning, there were parents involved; the parents' concerns have to be considered too. In the union approach, the unionized employees were the concern; their concerns should be heard. There are all kinds of individuals involved in the mix. What I would like to share with you is my involvement as an MPP, because we act as an ombudsman in a lot of cases. They come to us with a real concern, and you do what you can with the resources you have available to you.

If a person who comes to me—and I know this has happened on a number of occasions—not because the Ombudsman's office has indicated to me that they think the person has gone over my head to the Ombudsman, but a couple of them have been kind enough to send me carbon copies of their letter with their concerns and what I did and did not do. They asked for some clarification on whatever the matter was, and some of them are very serious matters.

I, as an MPP, feel very comfortable with that process that is going on, whether I know about it or not, because I know if I have done wrong, at some point somebody is going to say to me: "Look, this is how you acted in an

illegal situation. You are in a bind." I will continue to operate as I do as long as I can, but my concern has to do with the whole bureaucracy that my colleague Mr. McClelland was trying to talk to you about.

When parents think their child has been taken away from them unjustly and they are fighting that bureaucracy, even though there are 18 compassionate reviews in there, that is a roadblock that an individual has a tough time meeting and overcoming, because generally it is the kind of situation we were in this morning, where the kid is taken away, having been on the verge of death, and the parents are blamed for the situation—unjustly, in the final analysis. From a child's point of view, because of the uncertainty of the situation, I think the children's aid society, probably on the basis of information it had, acted very well, and the period of time with respect to some of the other cases we have talked about—four months—was relatively short and it was all sorted out.

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It seems to me that if there is any way in the system to do the kind of reviews that are automatically done by the system with the overview that the Ombudsman is there to handle all of the individuals in the mix, and with the proper attitude towards that kind of approach, it would be a lot better from an individual point of view.

If in a certain situation you go overboard on behalf of the child or have an incompetent staff person, and in hundreds of people out there there have to be some who do not do their job right, an independent agency looking at the odd case at the appropriate time seems to me to be a healthy kind of stopper. A lot of injustice could be stopped at various points along the way if that kind of arrangement were made logically with all the parties involved. If it is an adversarial kind of an approach, such as we have been talking about today, I think it is going to be bad news, because everybody is going to be defending his own turf to the disadvantage of the client in all cases, I might add.

What I am saying in this situation is I do not think you should back off from the good job that has been done by the children's aid societies. I think those of us who have been looking at this for quite a period of time now are seeing there are obviously individuals who are maligned in society. It is not necessarily the child in your case; it might be the parents or it might be a union person. It seems to me that expanding the jurisdiction within the parameters within which the Ombudsman has worked is a good idea, because if there is a review process in place, they do not go at things until that is complete.

The only thing that seems to be a problem with the ministerial reviews at this point in time, because your processes would probably work everything to that level, is that all they can look at is the ministerial review. They cannot really look at how that got there. It seems to me, on the basis of a mistake being made in this situation, the society or whoever could do something about that same kind of mistake not happening another time.

I do not think people within the system are knowingly going to cover up for people down the line in most situations. They would not be doing it that way. I would like you to comment on this aspect of it. Within the Ombudsman Act it says that if there are review processes in place and those are completed. Some of these could go to ministerial review, and six of them have

got that far. The results of those six may or may not have been satisfactory, but if one, two or three of those had been given to the Ombudsman, would there not be an advantage for the individuals who perceived themselves to be maligned in the situation?

Mr. Caldwell: I guess the major problem I have and why it sounds so aggressive is that we do have a process of court. This is the basis which you seem to be missing in your debate with us that we are independent. We are not independent, in the sense that we must present evidence in court. If you are maligning the court system, that is another issue. These judges are appointed. They hear the cases. They spend hours agonizing over the decisions they make. Then, when a court decision made, there are appeal procedures, right to the Supreme Court of Canada, and we have been involved in them, on the whole Charter of Rights issue.

Mr. Elliot: That is not my point. My point is the kind of situation we talked about this morning, where the individuals concerned had spent \$10,000 of their own money. If they had gone to court, it would have been \$20,000 of their own money. They are not rich, as somebody said. That is a lot of money to them. There is no recourse for those people other than to fight the system until either their physical beings are exhausted or their money is exhausted. When they are fighting for their own kid, they are going to spend their resources to do that.

While the courts might be there, there are an awful lot of people I talked to who, first of all, do not know how to access the courts and, second, do not have the money to pay the bill if they do. Legal aid is not available to all of them because of the fact that it is not an unlimited pool of money. The point I am making is that people like myself, who have worked every day of our life, would blow everything we own by way of equity right now in a particular case, because we could not get legal aid. A lot of people who come to me are in the same boat I am in. That argument of being able to go the court is exactly the kind of thing I am concerned about, because courts are very costly. If it is going to be a court challenge every time, a lot of the people out there who feel they are maligned are not going to take advantage of that and they are not going to get satisfaction.

Mrs. Genereux: I guess one of the questions I have is that if someone in that situation goes through the various processes which are available, depending on his circumstances and what the issue is, and he also have the availability of the Ombudsman's office at the end of that, I do not know that he is going to get any further satisfaction out of that.

They are not necessarily going to get any of their money back. The matter has taken a period of time, so they probably have reached whatever resolution there is going to be. I am not sure I see any value for them as individuals.

Mr. Elliot: I would like a clarification on the money. The Ombudsman has the power to recommend that the money, or some part of it, be paid, so there are settlements made all the time.

Mrs. Genereux: Yes, by the government, though. The payment would be through a compensation as opposed to, say, costs against a society.

Mr. Elliot: I do not care where the money comes from. With the individuals like the ones this morning who kicked out \$10,000 and were finally judged to be innocent, that money should be paid out because they were

fighting a battle they should not have had to fight in the first place.

Mrs. Genereux: I would like to correct a small misconception. In terms of family court for child welfare matters, innocence and guilt do not exist. It is not a win or lose situation. I think that is a really important perception that we as societies have to continue to put forward.

Mr. Elliot: But if I am a parent and I lose my kid, I have lost. That is the point I am making.

Mrs. Genereux: You have, but the child does not necessarily lose.

Mr. Elliot: He has lost his parents.

Mrs. Genereux: In some situations, that is a win. That is the kind of thing that arises. For somebody, there always has to be a less than ideal conclusion. In many instances, it is the society, as opposed to the individual parent, or the child or whatever.

But I think your point is that after they have gone through the process and the child is returned to them, they must have been in court on a number of occasions prior to that lengthy—whatever it was, four months, nine months, whatever. They must have been before the court in that time frame.

Mr. Elliot: The point is they spent that much money and they never got to court.

Mrs. Genereux: I guess I have difficulty believing that.

Mr. Caldwell: We are at a disadvantage here. You are quoting cases we know nothing about.

Mr. Elliot: You can hire a lawyer and spend a lot of money on a lawyer and not go to court.

Mr. Caldwell: Was it a custody or a child protection issue?

Mrs. Genereux: If it is a child protection issue, it has to be in court within five days of an apprehension. There is no leeway on that. The act is absolutely clear on that.

Mr. Caldwell: If they were dealing with custody, I referred to that earlier: that is before the court.

Mrs. Genereux: That is not where we become involved.

Madam Chairman: Just for clarification, it was a child protection case. I understand there were a number of adjournments and then it was the effort to get the child back from the foster care home or a temporary residential place. I think the point Mr. Elliot is trying to make, though, is that at some point these people incurred costs, expense, inconvenience, distress—I could go on with adjectives—and ended up with their child back. I think he is just saying that—

Mrs. Genereux: But my point is that during that period of time a judge must have determined that on an interim basis the child would stay with the society, whether it was on their consent or after a partial hearing. So it was not merely an administrative, internal children's aid procedure that had

reached that conclusion. From listening to Mr. Zacks, I would think the court settings would have to be unusual situations before the Ombudsman's office would, in any way, intervene.

Mr. Elliot: The problem with our cases usually is that it is not just the children's aid society; they are cases where a hospital was involved, the court system was involved, where there were a number of things. It seems to me that is one of the other reasons you need an outside agent like the Ombudsman to take a look at some of these situations, because, with my clients again, it is the change in jurisdiction as they go through the system. They just get familiar with fighting the hospital and that part of it, and then all of sudden there is jurisdiction by the children's aid society and they come to grips with that, and then there is a courtroom process to worry about.

In the particular case this morning, the judge was really good. He took all the evidence into consideration and, in my view, came up with the right decision, but at some point, particularly at the hospital stage, if the Ombudsman had jurisdiction there, there could have been a review at that stage and it might have turned out completely differently.

What I am trying to argue here is that I think we are arguing whether you are going to have jurisdiction or the Ombudsman is going to have jurisdiction, and it really is not that kind of an arrangement in the cases I have had a chance to study in the year I have been on the committee. It is a case where, through the process, everybody was treating according to the appeals, etc., that were in place, but still, from the individual's point of view, he did not get satisfaction so he got one last shot at it by going to the Ombudsman and that kind of over-review was advantageous in a lot of cases.

Mrs. Genereux: One of the other things clients find, though, is that when they work with children's aid societies, they also often work with children's mental health centres or children's and youth institutions and a wide range of children's services over and above or in addition to children's aid societies. Given some of the arguments I have heard that those kinds of agencies have far fewer review processes than children's aids, probably, and in many cases have greater financial involvement by the province than children's aids, if our societies are going to be involved, then I would think it would make more sense, even in a hierarchy of things, to look at the others, even prior to children's aids. I am not advocating you pursue that avenue, I am just trying to strike a balance.

One of the difficulties when you have a child who is either a child of special needs or a child who needs a particular kind of care at a particular point in time is that you have a variety of services that are involved. If there are medical issues, then you have to have your hospital or your doctor or whoever.

Mr. Elliot: You have been very helpful. Thank you.

Mr. Philip: I just wanted to ask you, what other agencies are you talking about?

Mrs. Genereux: Children's mental health centres.

Mr. Philip: But children's mental health centres would be covered by the Ombudsman.

Mrs. Genereux: Are they fully now?

Mr. Philip: What other agencies?

Mrs. Genereux: Then there are children's and youth institutions. Are all children's mental health centres covered, even though they are not if they are independent corporations of their own?

Mrs. Meslin: The ones listed in the schedules are.

Mrs. Genereux: But there are, what, four or five under schedules now? Most of them have been delisted.

Mrs. Meslin: It is only the ones that are listed in the schedules that are. The ones that are not listed in the schedules are not.

Mrs. Genereux: The vast majority of children's mental health centres were delisted in June 1987, so my understanding is that only those children's mental health centres that still have a psychiatric component to their residential settings are still listed.

Mr. Zacks: We do investigate complaints of those hearings, although we do not have any; but if we did, we would.

Mrs. Genereux: Most of the children's mental health centres are what are called transfer payment agencies.

Mr. Zacks: Yes. There are a number of transfer payment agencies that we investigate complaints about. There are also some that are in a relationship with the Ministry of Correctional Services and the Ministry of Health, I think, and we investigate those types of complaints.

Mrs. Genereux: Those are directly operated, I believe. The only reason I question it is that I was also employed by a children's mental health centre and it was not subject to the Ombudsman.

There are also children's and youth institutions, private group homes that are funded or that are on a contract basis with the Ministry of Community and Social Services, and also homes for the developmentally—

Mr. Zacks: We investigate complaints of those hearings.

Interjections.

Madam Chairman: It is great for information, but it is not pertinent.

Mr. Philip: I guess my comment would be that if the Ombudsman now, as it appears, does have jurisdiction over those other agencies, then why should he not complete the rest of the puzzle, because he may well get complaints via the other agency?

Mrs. Genereux: I understand that argument and I do not want to argue with Mr. Zacks, because I would have to check with a couple of people, but I do not believe that the majority of transfer payment agencies are covered. I do think that should that extension of jurisdiction occur, it should be system-wide and not simply one group of agencies within. I will leave it at that.

Mr. Philip: One last question: on the comment that was made that a decision by the court might in fact be the right decision, would you not agree

that the decision might be right, but the process in arriving at that decision could be wrong or could be flawed and that it would be appropriate for the Ombudsman to investigate whether or not the process had flaws in it, since that might affect other clients?

Mrs. Genereux: In the process of presenting a case to a judge, you also have to go through a process of how you reached your conclusion, so very clearly the judge scrutinizes your process as well as everything else, and your decision-making, so I am not sure. I suppose my biggest concern is, is there something more that the Ombudsman's office can do? From my vantage point, I do not think there is more they can do in the vast, vast majority of situations.

Mr. Philip: Let me give you an example, then. The Ombudsman brought a case before the committee in which there was a firing of an employee. The committee concurred that the firing was correct because the fellow was a scoundrel who should have been fired, but decided that the whole procedure whereby this man was in fact railroaded, if you want, into the firing was wrong and therefore chastised the particular agency. It seems to me that is a legitimate function of an Ombudsman. Even where the end result may be correct, the method of arriving at the end result may be wrong and I guess I want the protection of that outside view, maybe not to protect the individual case where the end result was correct but to protect others where the end result may not be correct as a result of the process.

Mrs. Genereux: When you have the collective agreements, though, the process of increasing disciplinary action is usually set out in that collective agreement. Would you see the Ombudsman's office reviewing the collective agreement?

Mr. Philip: I am not talking just about hiring and firing. In your cases, anyway, most of your employees are not unionized, or large numbers are not unionized.

Mrs. Genereux: Well, close to 38 are, so well over half.

Mr. Henderson: I had a couple of short questions that actually were conceived as supplementary questions a while ago, but I now forget what they were supplementary to, so I will just ask them as free-standing questions.

On the business that—correct me if I have not got it quite right—in family courts there is not an issue of guilt or innocence, what crossed my mind when you said that was that although I know it is not what you meant, it is implicit in that that parents can lose a child without ever being found guilty of anything and therefore without having had the safeguards and protections that are afforded to people who are at risk of being found guilty of something. Would you not agree?

1540

Mrs. Genereux: If you are looking at the process in terms of the primary question in terms of the family court, you are looking at the question of whether a child is in need of protection. The act sets out in subsection 37(2) what the needs of protection are. They are not specifically defined and are certainly open to judicial interpretation, but they do set out the tests the society has to meet. It is the onus of the society to meet those tests.

Mr. Henderson: I do not want to seem legalistic, but all children

are in need of protection. What you really mean, I think, is in need of protection from their parents. That, at least implicitly, carries an issue of judgement about the parents to which the parents ought to be entitled to respond with all the protection that is offered to people who are accused of something, it seems to me.

Mrs. Genereux: I suppose what you are really addressing is what the onus of proof is. What the onus of proof is in a criminal trial is somewhat different from in a civil trial. Your guilt and innocence is really within your criminal court system. I do not know whether that assists you.

Mr. Caldwell: I would just re-emphasize that the focus is the child in the child welfare hearing, in respect to whether or not that child is at risk. If the court determines on the preponderance of evidence that the child is at risk—the terminology we use is "in need of protection"—the court then has a number of options.

If, for example, in the proceedings it becomes apparent that the parents have abused and so abused the child that criminal charges should be forthcoming, that is a matter for the police, as Mrs. Genereux was saying, and that is into a criminal court and they are found guilty or innocent. Does that help any in terms of the risk issue?

Mr. Henderson: I guess so. I guess I began with the premise that children, especially children at risk, need their parents unless there are reasons to have it otherwise.

Mr. Caldwell: You do not want us to give the horror stories.

Mr. Henderson: I think I have heard a few of the horror stories.

Mr. Caldwell: We could take the rest of the day on horror stories, on why parents abuse children.

Mr. Henderson: Surely, that is what the Ombudsman is for. It is for horror stories. Surely, that is what the Ombudsman is for, so that there is a place for people to turn.

Mr. Caldwell: The children's aid society is for horror stories. That is what we are in business for, is to protect kids.

Mr. Henderson: When people come to us as legislators and give us a horror story about the children's aid society, we cannot help but think that there ought to be somebody to turn to when you have that kind of an experience.

Mr. Caldwell: One of the best defences parents have, of course, is to come to the MPP and say, "What a horrible organization that children's aid society is." I hear the stories all the time, horror stories supposedly of children's aid societies. You investigate and then you begin to wonder. The most defensive people in the world are those who are the most guilty.

Mrs. Genereux: The other thing is that in the principles at the beginning of the act, it reinforces that the parent should have autonomy and should be involved with children. Certainly, if that is possible, then that is what is done.

Mr. Henderson: I like the sound of those principles.

The second short question is this: to go back a little further to your comment about a rule of law or something, the idea being that the courts are the final arbiter, would you not agree that there might be a place for a body that can say, "OK, now that we have seen how"—let me back up a step.

I think, as somebody pointed out this morning, perhaps Mr. Zacks, that the courts deal with situations that come to them according to the law and according to legal precedent. There might be a place for a body that has the authority to say: "Given this case, given these circumstances and given what this court did, clearly the law is not working for justice. It is working in some other way. We need to take another look at it and maybe reframe the law."

Mr. Caldwell: I suggest, with all humility, that is your role. You are the legislator. You have put forward a perfect case for the legislator. You are the court that I see doing that, not the Ombudsman; I am sorry.

Mr. Henderson: That is fair enough. It raises the question of staff and time and logistics and so on that we have discussed many times, but fair enough.

Madam Chairman: I have a couple of questions and one clarification. I see some misconceptions about the Ombudsman brewing here. I did want to answer your one remark about what people do once they go to the Ombudsman and are still not happy. I just wish to advise you that they then come to this committee. We have a subcommittee that deals with such problems, which a few of us are on. I wanted at least to make that known to you, that there is another appeal process within the function.

Mr. Philip: Please do not tell too many people.

Madam Chairman: Pardon me, Mr. Philip?

Mr. Philip: I said something that was completely incomprehensible and that I am sure is not on the record.

Madam Chairman: Good. My hearing is failing.

I have a couple of questions. One is the understanding about your funding. I understand from your regulations that 80 per cent of your funding comes from the provincial government and 20 per cent from municipalities as a generic. I recognize that you do private fund-raising campaigns in order to support, let's say, supplementary ancillary programs that the children's aid society would like to operate, but the base funding is in that order. I wonder what led you to make your other statement earlier today.

Mr. Caldwell: Through a marvellous process in 1967, our centenary year, we were able to get child welfare included under the Canada assistance plan as one of the shared-cost programs. Therefore, 50 per cent of the dollars come from the federal government, 20 per cent are assessed to the municipalities under the legislation and 30 per cent from the province. That was the clarification. It is under the Canada assistance plan.

Madam Chairman: Would you agree those are all governments that are giving you money?

Mr. Caldwell: Yes, we have been fighting for that.

Madam Chairman: I thought I heard the statement that you were not

government-funded at the end. I guess my hearing really is failing.

Mr. Caldwell: No, I said 50, 30, 20, federal, provincial and municipal. The other point was we do have some private funds that we raise.

Madam Chairman: In terms of section 64, the review process, would that avenue be open to persons who felt they had been mistreated or inappropriately treated by the children's aid society by having their child apprehended? Would that process be open? Does "regarding services sought or received from the society" include those persons?

Mrs. Genereux: That process is open to anyone. In a number of societies, they ask the client to defer his complaint until the court process has been dealt with. If they do not, then the society still tries to deal with it.

The other thing that is, I think, of significance is there are other service providers that have also availed themselves of this complaint procedure and, in a number of instances, have had an effect in changing an existing policy. It has been beneficial to the societies as well as sometimes time-consuming.

Madam Chairman: I want to express my views on the alternative of the press. I think, Mr. Caldwell, you alluded to the fact that it is an alternative of last resort for individuals. I would say that people who are innocent would perhaps be even more reluctant to take that course of action, because there is a certain assumption in our process of the press. We all come to conclusions if people are accused in some instances.

I hate to allude to her, but Susan Nelles is an example that has come to mind for me. There are some who probably still believe that there is some portion of guilt in that area, and she was freed by the legal system. There are a whole bunch of queries in my mind about that situation and that is one that comes to mind.

Although I do recognize you are saying that is an alternative, I would suggest that the Ombudsman's anonymity and his process are a better alternative than the press. I say that not to be aggressive, but only because I think that is indeed a last resort for people in a situation where they have been accused of something, say, as serious as abuse of their child. That came to mind.

Are there any further questions from the committee?

1550

Mr. McClelland: I want to comment, and too often we spend time repeating ourselves in these types of forums, but I want to reiterate what Mr. Elliot said. I had concerns about the appearance or the atmosphere of some sort of adversarial-type nature here. I think what Mr. Elliot said bears repeating, that as you have come before this committee today, I think each one of us appreciates the fact you are here. It is a question that I think requires a tremendous amount of wisdom and consideration. We are seeking your help on that, and I want to reiterate what Mr. Elliot said.

We would not for one minute suggest and want to call into question, as I said at the outset, the goodwill and best intentions of everybody involved in children's aid societies. I think what we have said at the outset, or what I

tried to say, was that if and where those very few and far between problems may exist, is there a role the Ombudsman may be able to address?

I want to thank each one of you for helping us in those deliberations.

Mr. Bossy: Just very shortly, trying to analyse, I guess I got the message quite clearly that you totally oppose the Ombudsman having any extension of his jurisdiction. At the same time, I get quite a feeling here that we have 18—or whatever—kinds of appeal within the societies that exist across this province. As a member of parliament, when I have a complaint that really deals with a very irate parent—or whoever it may be—concerning the society itself, my best resort would be to go and see the Attorney General, I guess, and have the AG take action against that society. Not to really jump to the high level, there is no intermediate resolve to the thing.

In other words, the agency or the society should be investigated by the Attorney General's office if the case is such that all your appeals have been exhausted and that person has not been able to get an answer. You are saying there is no way that there is a further intermediary, the statement could be made, or an investigation.

Mr. Caldwell: Just to be clear, my options at the beginning were to say that if you are going to add another, why not consider doing away with what we already have and make this the one procedure? I think I said that very clearly at the beginning. I think the taxpayer has a right to how many procedures we are going to have and what the costs are. I tried to illustrate mainly what these procedures, as Mrs. Genereux has said, have been costing us—in the order of \$11.7 million. Maybe the Ombudsman would be the cheapest way we could go about it.

If we had only one organization dealing with it, that would make life a lot simpler, but there is a complicated process involved, and you are the Legislature. You are the people who make the laws. We are trying to carry them out and we are saying: "Don't add more to it, after 18. Don't add another full layer to it."

If you want to change it, that is your privilege. That may be the best answer, but do not give us both. That is mainly my response.

Madam Chairman: A final comment from Mr. Pollock.

Mr. Pollock: I would just like to comment briefly on what Mr. Caldwell said on going to your local MPP. Under the freedom-of-information act, we can get very little information on some of the very trifling things, as far as I am concerned. If you start to investigate a situation such as welfare or something like that, we cannot get too much information. On something like child abuse or a few things like that which might well wind up in the courts, I am sure there is going to be a whole host of people out there who are going to be very, very reluctant to give us any information.

Madam Chairman: Any response? I would like to thank the society for coming before us today. You were well prepared and had a number of top-level individuals. We appreciate your taking the time to inform us of this. We appreciate your attendance and we will certainly take what you have given us into consideration. We will have an opportunity to read through the documentation in more detail when we adjourn. Are there any last things from the committee?

Mr. Philip: We really are glad you are out there, notwithstanding any arguments we may have had today.

Madam Chairman: Yes. We will readjourn tomorrow morning at 10.

Interjection: Reconvene.

Madam Chairman: Reconvene. I do not have Mr. McLean here to tell me which one I am doing. We will reconvene tomorrow at 10 a.m. unless there is anything further.

The committee adjourned at 3:55 p.m.

STANDING COMMITTEE ON THE OMBUDSMAN
EXPANSION OF OMBUDSMAN'S JURISDICTION
WEDNESDAY, AUGUST 24, 1988
Morning Sitting



STANDING COMMITTEE ON THE OMBUDSMAN

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McLean, Allan K. (Simcoe East PC)
Pollock, Jim (Hastings-Peterborough PC)

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Philip, Ed (Etobicoke-Rexdale NDP) for Mr. Mackenzie
Villeneuve, Noble (Stormont, Dundas and Glengarry PC) for Mr. McLean

Clerk: Carrozza, Franco

Staff:

Wilson, Jennifer, Research Officer, Legislative Research Service

Witnesses:

From Justice for Children:

Vogl, Robin, Staff Counsel
Weagant, Brian, Staff Counsel

From the Office of the Ombudsman:

Meslin, Eleanor, Executive Director
Zacks, Michael, General Counsel

From the Ontario Hospital Association:

Cunningham, Gordon R., President
Short, Hilary, General Manager, Public Affairs
Shushelski, Carolyn, General Manager, Legislation Services
Weinper, Laurie, Patient Representative, Mount Sinai Hospital

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Wednesday, August 24, 1988

The committee met at 10:12 a.m. in committee room 1.

EXPANSION OF OMBUDSMAN'S JURISDICTION
(continued)

Madam Chairman: If we can call the meeting to order now, are there any comments from the committee before we begin?

Mr. Philip: Just one comment. I am wondering if, with the change of agenda for tomorrow, we might ask the Ontario New Home Warranty Program to appear at 11 o'clock.

Madam Chairman: We have considered that. I guess we certainly could, but my concern is that they may go on in excess of one hour, if last week's conversation or discussion with the ministry is any indication of what is going to go on with them, but we could certainly ask them to come at 11 and perhaps go into the noon hour and finish by one or something. That would be appropriate.

Mr. Philip: Yes. It is not a particular concern to me, being a Metro member, but I think some of the out-of-town members do like to get home to see their wives and constituents and I just thought it would be better for them.

Madam Chairman: They have been around listening in on or attending our hearings, so why do we not see if they can come at 11 and then maybe we can go through till 1 p.m. and adjourn at that time?

Mr. Philip: Fine. Thank you.

Madam Chairman: Anything else? OK. We have before us today the Justice for Children group. We have Brian Weagant, who is the staff counsel, and Robin Vogl, who is with the legal clinic and also with Justice for Children.

Mr. McClelland: What is that last name?

Madam Chairman: Brian Weagant and Robin Vogl. There is no vowel between the g and the l. If you have a presentation to make, we would certainly listen to that attentively. Then if you would allow some opportunity for us to respond by asking questions, we would appreciate that.

Mr. Weagant: Very well. I distributed, I hope, a three-page summary of our recommendation.

Madam Chairman: I think everyone has it.

JUSTICE FOR CHILDREN

Mr. Weagant: I attended a meeting once that the Law Society of Upper Canada held on effective lobbying. They said by the time you got to a committee, you should be able to get it all on one page. I could not. We will

walk you through it.

First of all, let me tell you what Justice for Children is and that will give some context to our remarks. We are the operating arm of the Canadian Foundation for Children and the Law. We are a community legal aid clinic that is funded by the Ontario legal aid plan and, therefore, largely by the Attorney General.

We are a specialty clinic in that we are only supposed to be working for low-income children. We occasionally do act for the odd parent, but it is in education cases where the child is not in a position to take the case forward for himself. Right now, we are heavily into the areas of young offenders, education law, mental health law and child welfare.

We are staff counsel. Robin Vogl is with us for only a short period of time. However, she used to be senior counsel at the Children's Aid Society of Metropolitan Toronto, and we thought it might be helpful for her views to be brought to you this morning since she has been on both sides of the coin here, so to speak.

It should be made perfectly clear that we are not children's aid. We are lawyers who act on the instructions of our clients. We take forward the position of whatever the child wants. In that respect, we are a child advocacy group. You should know that most of our clients are between 12 and 17. We do get the odd client who is younger than that. The context I am trying to paint for you is that, to the extent we can, based on our experience in this area, we are here on behalf of the consumer.

Several years ago, in 1983, we were asked to respond to the Child and Family Services Act consultation paper, which was called The Children's Act: A Consultation Paper. We took the position at that point in time that after a basic internal review of complaints, a child should have the right to access a children's Ombudsman. The current proposal that the Ombudsman has put in front of you has, in a way, brought up the issue again: Is there a role for an Ombudsman in the child welfare world? We reconsidered our position and let you know right now that our position really has not changed.

We have been working with the act in the courts since it was implemented, or since what parts of it have been implemented, and we bring that experience to you. We are not going to regale you with stories about the deficiencies in the review processes that exist. I believe other groups have been in front of you telling you about how good they are or how bad they are or where the gaps are.

Off the top, I am going to say there are gaps for the consumer in those 18 review procedures you heard about yesterday, but the point was well taken, by Mr. McClelland, that the vast majority of those reviews are more operational reviews. They are there for the ministry, they are there for internal accounting for the societies. The consumer is left with a smaller number of reviews and those reviews do have inadequacies.

It is our recommendation that the government should reconsider at this point in time, given that this proposal is in front of it, what to do about these deficiencies. We see one of two things happening. One is the act can be beefed up, those deficiencies can be accounted for and whatever changes have to be made can be made; if an appeal is to be put in section 64, put it in, or whatever.

The other route the government can take at this time is to restructure the whole complaint resolution mechanism in the act. That is the jumping-off point today for our comments. It will be our recommendation to you that there should be a restructuring of the complaint mechanism, that there are three fundamental problems with the way the complaint mechanism works in the act and that they are so fundamental that the better choice would be to change the way things are done.

We are going to divide the three up for you. Ms. Vogl is going to take the first two and I will get in later. That is our jumping-off point. We are recommending that the government scrap some of the review procedures that exist and we will be making a recommendation about what we think should fill the gap.

Ms. Vogl: I think the first problem with the internal or ministry review mechanisms is that, from a consumer's point of view, they seem to be weak or futile. For one thing, they certainly do not appear to be unbiased. In fact, I think in many cases they really truly are biased in the sense that the front-line worker may have made a decision in consultation with his supervisor about, for example, whether money can be given directly to a client for a specific purpose. Indeed, they may have been in receipt of a memorandum from a service director saying, "Moneys are short in the next little while. We would ask you to be very careful about moneys given for taxi fares or for various things" that, from a consumer's point of view, might be essential. Therefore, using that internal complaints mechanism may indeed be a futile exercise for the client who is frustrated with the fact that he has been denied a specific request.

Certainly you can go as far as the director, but the director has probably been briefed by the staff, so the position that resulted in the memorandum being given out was probably decided in conjunction with senior management and indeed often the board. I think from that point of view, the internal mechanisms of the CAS would be questionable from the point of view of somebody who is a client on a case load.

I think the access to the ministry person is equally suspect. It certainly would not appear to be unbiased, because indeed the ministry is in charge of the funding of the agency. The program supervisor is in regular contact with the agency and has probably heard about the issue from the agency first. I really think there are some problems with the appearance of fairness in that internal procedure.

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The client frequently, I am afraid, perceives himself or herself to be powerless. Most certainly, the children do. They feel these decisions are made by this great authority which is determining all aspects of their lives. They ask the question, they get an answer, and I really think it very rarely plays itself out in terms of their options being presented to them and their actually knowing they have some rights to pursue.

We are talking about parents. The issues may be highly emotionally charged. They may not be the most articulate spokespeople for their own problem, and indeed they may not see the avenues open to them as readily as we might hope, despite the fact that the procedures exist. I know there was a very clear effort initially, when the legislation was passed, to make sure that these procedures were developed and that people knew about them. I am afraid that over time what happens is they lose emphasis. I am not sure we can

be assured that everybody who comes in contact with the children's aid society is fully aware of the legal processes available to him.

The problem as well, from a consumer's point of view, is that they are overly complex. You have heard the association describe to you how many review mechanisms exist. Certainly the ministry has outlined them to you. I think it is rather ironic that when Mr. Weagant and I have on occasion tried to determine which is the appropriate route in order to deal with the problem—we are both experienced lawyers in the area of the Child and Family Services Act and indeed the system in general—we have had trouble determining which is the appropriate avenue. I would say if we are having trouble with it, you can bet your average consumer is going to have a lot of trouble with it. I do not think the intention is that they should have to hire a lawyer in order to get these things resolved.

From those points of view, I think that the existing processes are problematic. We are not, however, suggesting they be abolished altogether. I really think it is probably always good management practice to have a vehicle for handling complaints internally, but I really would argue that it should not be a mandatory prerequisite to the accessing of an Ombudsman. I think we cannot force people to go through this procedure. One of the major reasons I think it is not a good idea is because some of these issues are very urgent and need a quick response. You have probably heard that before and it is argued in the report from Dr. Hill.

Just to give you an example, we have recently been trying to get an agency to negotiate with us about what would go in a referral package to placements. There is one report that we have some difficulty with and that we think may prejudice the child's opportunity to be placed and should really not be in that package. We had ongoing discussions with the counsel and with the workers involved. I recently got a message saying: "Well, the packages have gone out before we could get a resolution to your question. However, the next batch will be prepared to make the changes." This original batch went to six different resources that now have the package. In other words, it did not happen fast enough. Whatever process was in place did not allow for this to be dealt with soon enough, from the point of the child. Those are the problems that we see with the internal or ministry mechanisms.

The other difficulty we see is that the present system tends to lead us in a direction of a case-focused response, a squeaky-wheel response instead of a systems-focused response. Let me give you an illustration just to let you know what I am talking about. Yesterday, I happened to be in court on a child welfare matter. There was a situation involving five different children who are all presently in care. They are all in the same family, but one has been placed in an admission assessment home in Scarborough, two have been in a foster home in Bradford and two have been placed in a foster home in Whitby. You probably are all aware of the difficulties encountered in the foster care system these days. Getting a foster home that will accept four children—and obviously one needed assessment so it would not have been appropriate—is nigh on to impossible.

So these children were spread all over. At court, it was proposed that one of the children in one of the foster homes be returned to the care of an extended family member, so we were now talking about four different placements for these children. This matter happened to be before the courts and the courts are probably the best place to resolve it. Certainly, in the wake of a court application, negotiations run fairly fast and furiously. In this case, it could probably be resolved, but this could just as easily arise a month

after the court proceeding when nobody can get to court for another five months.

Let us assume for that purpose that this is not in the context of a court application. The child's counsel was concerned that these kids see each other. I think that is reasonable. I think we would all agree that these kids should have contact with each other and she was proposing what she thought was a very reasonable suggestion, that these kids see each other every second week.

The practical reality for the children's aid society in this case was that because they would be requiring three different sets of volunteer drivers to go and get these kids from three different settings—actually it is four, because it is four different placements—the front-line worker would be called upon to do the longest trek because that would be what her supervisor would expect of her.

We would be talking about half a day of her time every second week plus arranging in place—and she would be expected to do this—three volunteer drivers to pick up the other kids. We would be talking about pulling these children out of school for half a day, and several of them have learning disabilities. So we are talking about half a day lost in school every second week because the system does not allow for weekend arrangements like this. The workers are not hired to work weekends. There are no volunteer drivers in place for weekends and the system is really not responsive to this sort of problem.

What you would have is that if the children's representative is a squeaky wheel, is effective, mountains will be moved to get these kids together every second week. However, this is a very global problem. It is a problem in terms of the foster care system and the difficulties in placing these kids and access in general and the transportation problems that exist around making sure kids remain in close contact with one another.

I see that someone who is an independent auditor, someone from the outside— You cannot expect the ministry to do this because the ministry is determining funding in the first place and would not be seen as independent of the system to really comment on some of the shortcomings that exist in the system and a more problem-solving approach about how it could be changed.

Certainly, I do not think you could fault the agency itself for balking at the suggestion that really does require a great deal of energy and dollars in order to make this happen. That is why we are suggesting perhaps that an approach which would allow for a more global and external audit is our preference to see that effective changes and recommendations are made.

Mr. Weagant: The third point we would like to make about the existing system is that it unfairly focuses on the children's aid societies.

The one thing which has to be clear in everybody's mind is that the children's aid society is one player in the child welfare system. It does not have all the resources it puts its kids into. What it does is contract out. It buys services from other agencies. It buys services from other transfer payment agencies. It buys services or gets services from children's mental health centres.

There is an issue about what the Ombudsman can do in the rest of the system. It is our understanding and our experience that if you are not in a directly operated facility, you then have to rely on whatever internal

complaint procedure presents itself at the purchased resource.

As an example, you have somebody who is placed in a group home run by a private agency, where there is a program in place that involves—this is an actual case—the use of a time-out room whenever a child swears. We are talking about a 14-year-old girl who spent some time on the street and had a taste of independence and was not about to clean up her language for anyone. Every time she was going to be placed in the time-out room, she said, "I'm not going into isolation because of what I said." It would result in a holding.

There is an issue about whether a 14-year-old can consent or not consent to that type of treatment. We took it up with the worker and the worker said: "You're right. The kid's not there for that treatment. The kid's there for other things, other aspects of this program." The problem is that this 14-year-old was extremely hard to place. This was not the best place, but the best we could get. There are 20 people lined up for that bed. We cannot negotiate the details of the program for every kid who goes in there. If you want the bed, you take the program.

So the CAS was more or less powerless to do anything about it on our behalf, even though it agreed. We then had to look to the facility and see whether we could come up with a creative legal remedy over there to stop what was going on. We got her moved, but the new facility is another transfer payment agency with its own program and something tells me problems are going to come up there.

There is no overlap for these complaint mechanisms. That is something the consumer faces. This is an important point, given what we are ultimately going to recommend to you.

What an independent review or an ombudsman can do cannot stop at the doors of the CAS. You have to realize how they just fit into the system in a small way. It has to be the whole child welfare system. It has to be the whole community resource system, the children's mental health system, everywhere in the child welfare system where these kids are being placed. Otherwise, it is a bit of a Band-Aid. Whatever you think the saving grace is of having the Ombudsman come in now, I do not think you are going to get those benefits.

Those are the three fundamental problems we see with the existing system. If you are going to restructure what might be done, our recommendation is that after a basic internal complaints review that is not mandatory, there be an independent review of some kind. This will necessarily mean that a lot of the reviews now open should be abandoned.

If the plan is to simply call an ombudsman in as the 19th review, then in spite of our differences about other things, a lot of the things you heard yesterday from the Ontario Association of Children's Aid Societies ring true about bureaucracy and layering, and what is being called for here is probably a more fundamental restructuring if you are going to call in someone from the outside.

We did not come prepared with an implementation plan today, but we can say that there are certain basic things that simply have to be if there is going to be an outside auditor, a children's ombudsman, in the child welfare system. Those are on page 3 of the brief.

The first is that the system has to be able to respond immediately. You have to remember that the problems of children in care do not concern huge

outlays of money on legal services. It may be something as fundamental as getting taxi fare home from a job one have to leave at one o'clock in the morning in another part of town. What do you do about that? Where can you go to fight about that kind of financing? Children's problems are different and they need a quick turnaround time. An ombudsman is going to have to be able to step in and fill that.

The second thing is that children are not very articulate about their problems. If you leave it up to them to make out the best case for themselves, it may not get made. There are internal complaint mechanisms available, for example, at Syl Apps Youth Centre, but our clients do not take advantage of it very often because there is an onus on them to put it in writing in a particular way in order for it to be investigated. From the consumer's point of view, we would recommend that the complaint could be made orally through an advocate, through the child's counsel or even through a concerned worker.

I must digress. Let me give you an example, a story. It is an interesting case that came in about six months ago.

I got a phone call from a kid long-distance from Brockville. It came through an adult. First, the kid would not talk to me unless there was a guarantee the kid would not be turned back over to the CAS in Kingston. Relying on privilege we enjoy as lawyers, I said, "I can do that." The kid got on the phone. He did not use these words but what it amounted to was emotional abuse in a placement in Kingston, Ontario. He would go back to the children's aid if they would make a deal not to send him back to that group home. He did not care where he went; just not back to that group home.

Our position is that even if the kid was imagining what was going on, it was real enough to him to run away, so something had to be done about this. I got on the phone to the children's aid in Kingston and the worker's position was that a 12-year-old boy could not hold their program hostage. There was a personality element to it. I do not know how deep that personality element ran in the society.

I could not make the deal, of course. I said, "Well, then the kid will stay where he is." I got a phone call a little while later from counsel for the Kingston CAS, telling me they suspected the kid was with a pimp and that by the next morning he would probably be in Montreal or Windsor being prostituted.

Did that change my position any? I act on instructions from the client and the client said he was not coming back unless they would make a deal about where he was going to go that night. I could not change my position. Shockingly, I could not change my position, given what I was confronting here. This went on for about three days, with constant phone-calling with my kid, my client from a phone booth and the CAS.

At some point, coming from Toronto where there seemingly are more resources, I said, "Surely that's not the only bed in Kingston." I got the response, "Well, you people from Toronto think the world revolves around you." It turned out that was about the only bed there was. It is a resourcing problem.

I lost contact with the kid the next Monday. By that time, the children's aid had changed its position. They found a bed for him in the Court

Home, which is the open detention facility for young offenders. This kid was not in trouble with the law, but there was an empty bed.

The story did not end there. A couple of weeks later, I got another whispering phone call, this time from the worker, saying: "Well, he's back and he's in the Court Home and things are fine, but don't let it stop here. The same thing happened about six months ago, with the same group home." I phoned around and found the reason the kid had not raised a stink was because somebody from the group home told him that if he kept up this bellyaching about what was going on in the group home, he would be charged with mischief. So the kid was being silent. The worker wanted to take him forward and she did not feel she had access on behalf of this kid to somebody. That is why we make the recommendation that it has to be made loud and clear who can take these complaints forward.

I am sorry for the digression.

Another basic thing that has to be in place if the Ombudsman is to step in is there has to be appropriate expertise. That does not go without saying—there has to be appropriate expertise. You need people who know the child welfare system, how it works, how the different agencies overlap, how referrals are made, why they are made and that kind of thing. You also need someone—I believe I heard this over here—who has an ability to investigate that type of system, which comes from that type of expertise. It has to be in place. Stepping in just as a lawyer and an investigator may not be enough. It is a red flag for the future.

As I said, the last thing we view as absolutely essential is that the recommendation not be just for children's aid societies. It has to be made absolutely clear that the whole system is accountable to the outside auditor, to the Ombudsman. This proposal really is limited only to the children's aid society. I had some discussions with my friend here earlier, and he said: "Sometimes we step in and sometimes we don't. We determine when we think the agency is close enough to the government and when it isn't." I will tell you it is completely unclear to those of us in the field when you can turn to the Ombudsman now and when you cannot. It has to be made clear that the whole system is accountable.

The last thing I can say is that if this route is followed, everybody wins in the end. You get outside auditing of the system, so in the short run it is going to clean up a lot of problems, but ultimately the service providers are going to benefit by this too. There are a lot of things now that the system cannot say about itself, will not say about itself, but an outside auditor like the Ombudsman with his stiff-backed reports that come out every year will be able to say, "These resourcing problems are fundamental to a lot of these problems."

You would be surprised how many of these problems you can trace back to resourcing problems. It is personality first, you think; it is policy first, you think, and then when you get to the bottom of it, it is money and the way it is distributed. That is something an outside auditor will be able to put his finger on, as Mr. Philip said yesterday. There is an advantage to having someone outside the system. Everybody will benefit.

Those are our recommendations, subject to any questions we can answer or dodge if need be. That is what we have to submit to the committee.

Mr. McClelland: First of all, I must say I am honoured. Your

anecdote actually helped me sort of formulate in my mind what I wanted to touch base with, one of Ms. Vogl's early comments. You said that children often feel powerless and that there is a squeaky wheel syndrome. In short, what is the relationship or role of the official guardian advocate who is virtually always appointed on behalf of the child? Having accepted the fact that the OG appointment is usually in place, I suppose the question that follows then is, are we saying that we are going to introduce into the system another potential advocate whose efficacy really turns on how much noise he can make?

That is a problem I see because you are effectively saying what we need is another advocate. We already have an advocate in place. Sometimes he or she is effective as an advocate, and sometimes not. Primarily, the ones who make the noise are effective. If what we are saying is that all we need is another one, another shot at somebody being noisy, how often do we keep doing that? I would like to hear your comments on the relationship, the role you see with the OG counsel.

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Ms. Vogl: I honestly do not think we can get into issues of quality. I think it is a wonderful institution. The problem with it is that not every child who is receiving services from the children's aid has the benefit of counsel. Counsel is appointed only in the context of a court application. They are usually retained for the purposes of a specific court application. Once that is concluded, if the child contacts the lawyer, then maybe the lawyer will know about this. Frequently, the children do not take the initiative to contact the lawyer.

The lawyer, frankly, is not retained to keep tabs on the child after the completion of the application. In many cases, the children are in care by a voluntary agreement. The official guardian does not necessarily get involved in those cases. In fact, they are fairly limited in the role they play and it is around the court process. If a child is made a crown ward, for example, and there are no more applications before the court, you will not see an official guardian representative acting on behalf of the child. That is not to say it is not possible for them to request the official guardian's involvement, but I think generally speaking their involvement has been limited to the court process.

We are really talking about a lot of problems that arise, not in the context of a case before the court but after a court application has been completed and the lawyer is no longer actively involved in the situation. It is not to say that is not a route that could be looked at, but I think it would probably end up not being useful for any client or consumer other than the child. We get that difficulty with a parent who is having difficulty with the agency and wants resolution of that. Certainly, it has been very useful.

Yesterday, I felt the official guardian lawyer on the panel was doing a very effective job of lobbying for these children's right to see each other, but had that occurred as a problem for the children outside of a court process, if the children had come in on a voluntary care agreement for a year, there would be no lawyer involved and there would be nobody doing that. There are gaps in the existing system.

Mr. McClelland: I did not really see the relationship until we got into your answer and I thank you for that. You made a distinction between a system review and a case review. If I am correct, and I do not want to put

words in your mouth, you are really talking about both. You are saying a system review does not always provide an advocate for the child. But also we have a case-by-case review, and you picked up on something we ought to think about right there, because I see you are saying that maybe the system needs some review. I am not sure that is the role of the Ombudsman on an ongoing basis. That may come as a product of a case review.

Ms. Vogl: Right.

Mr. McClelland: My question follows more specifically on the case versus the system review. You make a conclusion on page three, in the second from last paragraph, that the next layer of complaint ought to be with the Ombudsman or something akin to an advocate system or an external audit, an external review. Are you talking about that simply on a case complaint, and I want to get back to this distinction, or a system complaint? I know they are going to be linked but I have this problem. If we are talking about a case-by-case system, we heard yesterday that only about 2.6 per cent go to the top. The case-by-case system will inevitably lead to a systems review.

Let's say, hypothetically, that the Ombudsman is involved in the jurisdiction, gets involved in the case, act on behalf of a particular individual and then a systems recommendation is made contemporaneously with the case review. Why the second layer then? You mentioned timeliness as being critical.

It seems to me that if only 2.6 per cent of them are really problematic, are not resolved when they get to a higher level—unfortunately we do not have any data on which types of cases get to that level—I have a concern that it might be a little bit precipitous to jump in at that second layer, front-line caseworkers. How about the director? How about supervision?

I would like you to comment on that a bit more because if we are talking about case-by-case and as a client—let's presume I am a child—I am not happy with my case worker, at that point why do I not have the opportunity to go to the supervisor and/or the director?

Ms. Vogl: They do not have the opportunity?

Mr. McClelland: I would like to hear why you are suggesting at that first layer.

Ms. Vogl: We are not. Actually, what we are saying is that we think internal procedures should always exist in any healthy organization.

Mr. McClelland: I realize that, and you said you should not throw them out.

Ms. Vogl: If the client is happy with that process, you do not take it away. You do not force him to an ombudsman. But if the client is suspicious already and does not want to take the time and does not feel he is going to be heard in that process, then I do not think we should force him to go through it before he can go to an ombudsman. I think that is what we are saying at this point. It should exist. We think it is good and it may resolve a whole lot of them.

But if somebody really feels he has had it out with the worker, and feels the worker's decision was based on consultation with the supervisor, are we going to make him go through what could be a six-week process before he

gets even higher than those two layers, before we allow him to go to an ombudsman? We are suggesting that is not a good idea. People should be able to go because of the nature of these problems. They should be able to elect to go to an ombudsman even after the initial complaint.

I think it makes sense that the children's aid society should hear that they are aggrieved, although I must say there are lots of people out there who are so intimidated by the perceived power of an organization that they would even be afraid to take that first step internally. You know how you hardly ever hear a complaint about yourself directly. It is because people never want to tell you directly that there is a problem. They feel much more confident telling someone else.

Mr. McClelland: That has certainly been our experience around here.

Ms. Vogl: That is certainly my life experience as well.

I am just suggesting that if you want an effective vehicle where people feel comfortable—I do not question the statistics that have been presented to you about the small numbers that have reached the higher level, but I also have a feeling that many cases do not get grieved for all kinds of reasons, and that they would be if there was a better vehicle, a vehicle people felt more confident in and felt was available to them, where they would at least get some assistance in articulating their views.

I really think they have a lot of problems in taking on the big bad children's aid or the big bad whatever. It is a very scary thing to do, especially when in many cases this worker is still making day-to-day decisions about his children or themselves or, in the case of kids, about you and what you are going to do, where you are going to live and whether you get money to do this. It is a very scary thing to initiate your own complaint.

Mr. Philip: As a follow-up to Mr. McClelland's questions, as to the tables that were given to us yesterday indicating that very few actually made it up to the last level of appeal, I was left with the feeling that they did not really tell me very much. There was no indication that the people who only went to the lower levels in fact had their problems resolved. It may simply mean that they decided it was not worth pursuing any further, that the odds were stacked against them, that they died in the process of waiting for a decision or that other things happened in their lives that overcame the problem and that may have been more serious, and therefore they decided not to pursue it any further. Would you agree with that?

Ms. Vogl: I would. Certainly, I would not make a lot of assumptions about the significance of those statistics at this point.

Mr. Philip: A general question on your paper: you talk about a child ombudsman. I assume you would be equally satisfied with simply a branch of the current Ombudsman's office handling that. You are not calling for a special office called "child ombudsman."

Mr. Weagant: You must understand how an organization such as ours makes policy that goes forward. I cannot really answer that question. What we are saying is that whatever happens and however an ombudsman remedy is set up, it should have certain basic things in place. If it could be done within the office that exists, fine; if it needs a whole separate child ombudsman, fine

as well. We did not come armed with an implementation plan. That detail is not really what our recommendation hinges on; it is one of those basic things.

Mr. Philip: It is just my concern that in jurisdictions that have duplicated ombudsmen, the public gets very confused. It is better to have one-stop shopping in my opinion. You can have many branches of the Ombudsman's office, but I think you should have one ombudsman per province. That is a battle we lost recently when they created another ombudsman in Ontario to handle election expenses and so forth.

The union that represents many of the children's aid workers came out in favour of the recommendations of extended jurisdiction. On the other hand, we had the children's aid societies coming out against them. I wonder if you can tell us about this, as somebody who has been on the other side. We could not get a handle on it yesterday. The children's aid said, "I have talked to a few of my colleagues at the front line and they are against the idea," but of course, we do not know how the question was posed. Is it your opinion that the front-line workers would benefit from this or do you think the majority of them would be opposed to it and still very defensive about it?

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Ms. Vogl: I think it is a difficult issue, because one of the difficulties lies in the fact that— Having been on the inside, I can tell you that if you are a social worker and you are trying to cover a case load—the problem I described to you about the five kids and the travelling time is only one aspect of one of 26 cases this worker has to handle—and if you are running around having to deal with accountability and not having time to deal with your case work, this is a major problem.

Frankly, I can see how anything perceived as another layer of bureaucracy is not going to be welcome in this, I would venture to say, very underresourced and overburdened agency of government. It is not directly government run, but it is definitely carrying out one of the duties of a government.

I would say it is a major difficulty for a workload issue. On the other hand, it is kind of nice and clean to have an external person looking at it. They are involved in a system. They, for their own needs, have to conform with the expectations of the organization in which they work. I can see both sides of it and I can certainly see how you might get a varied response.

I did not have the benefit of the presentations and I have not really had time to review the written report from the Ontario Association of Children's Aid Societies. Perhaps Mr. Weagant can comment based on his understanding.

Mr. Weagant: What I think I heard is that towards the end of the discussion—and I hope I am being fair to Mr. Caldwell—their major complaint was about the added layer of bureaucracy and the problems that would cause in the organization. They did present a bit of an alternative at the end. They said that if you are going to bring this in, you have to disband some of the other areas of review, in all fairness to them. In truth, it is not a position too much unlike the one we are putting to you today.

Mr. Philip: I think what is happening, at least on this aspect of the Ombudsman's request, is that we may be coming up with some possible solutions, as groups approaching it from initially completely different points of view are actually saying the same thing in the long run.

My question to you is this: At the present time, the Ombudsman Act does not allow him to deal with a matter of complaint until all other avenues have been dealt with. I guess one of the things we could do is recommend a change in the Ombudsman Act that would give him earlier intervention.

The other thing you seem to be saying, though, and indeed that the children's aid society was saying yesterday—and any of us who are faced with this act, knowing other appeal mechanisms, have to agree with you—is that this has got to be the most complicated appeal mechanism anyone could devise. I am used to dealing with different tribunals, the transport board and various other ones, and they are absolutely kindergarten in simplicity compared to this thing. You must need a PhD in regulations to work your way through it.

Would it be possible, in your opinion, to eliminate a number of the upper layers of appeal and simply have the Ombudsman enter at one of the middle stages of appeal? If you did that, of course, the lower levels would be exhausted and you would be in earlier and you would not need a change in the act.

Mr. Weagant: From the consumer's point of view, yes. There is still going to be the need for operational reviews. There is still going to be the need for the discretionary ministerial reviews. But from those which are available to the consumer, I guess we are saying there would be an awful lot of duplication.

Madam Chairman: Could you move forward to the mike?

Mr. Weagant: There is no point in having both, and if you have to decide which one to get rid of, we are recommending that you get rid of some of the reviews that exist and bring in someone external.

Mr. Philip: Would a starting point be for this committee to recommend that the Ombudsman initially do a systemic review of the appeal mechanism, come back with recommendations on how it could be simplified and thereafter, once those changes are in place, have him kick in with the case-by-case appeal procedure? Would that be reasonable? I guess I have some worries about having him kick in with this procedure, the same worries which maybe the children's aid societies have, that you are just going to add an extra step. But if he were to do a systemic study and if his recommendations were then approved by this committee, and by the ministry following that, simplifying this huge document, maybe he would be in a better position then to act on behalf of the clients, the clients you are acting on behalf of.

Mr. Weagant: If you are saying you accept the basic premise that external review is necessary for the following reasons, and really what we are talking about now is the operation of such a review, then I think it would go without saying that you are going to have to take a look at the existing mechanism, see how it is structured, see how it can be streamlined and see how you can reduce duplication.

What we are saying is that there are some fundamental problems that we do not think can ever be corrected. By adding an appeal at the end of section 64, you do not get rid of that perception of bias you start with.

Mr. Philip: Just for my own information, would it be useful to have the Provincial Auditor do an audit of the children's aid societies? Are there inefficiencies there that perhaps could be corrected from a financial point of view: money being wasted on a lot of bureaucracy and red tape?

Mr. Weagant: I do not know that we are in a position to do that kind of thing. There are ministerial reviews. There are operational reviews. There are licensing reviews. I assume that is being done on a fairly consistent basis. I work for an organization that is indirectly funded by the Ministry of the Attorney General, and we almost have to account for stamps. I truly believe the children's aid is underresourced; they are probably pared to the bone as much as they can be—

Mr. Philip: I was thinking more of value-for-money auditing than worrying about how many stamps were used on a particular day.

Mr. Weagant: I understand what you are saying. I am in no position to talk or comment on that.

Mr. Philip: What would be the increased case load—

Madam Chairman: Mr. Philip—

Mr. Philip: This is the last question. What would be the increased case load to the Ombudsman if his—

Ms. Vogl: We were discussing that this morning. Obviously, it does not appear that the present mechanisms are being used in a high volume. On the basis of the volume of complaints that have gone up to the top, it does not sound like a large number. But I think the reality is that if it were seen as an effective vehicle, its use would increase substantially. If the kids knew they basically could get some help there and it was going to be effective, I really think you could find quite substantial volume. I would not venture to give you numbers or percentages.

Mr. Lupusella: My question actually was raised by my colleague Mr. McClelland but, if I may, I would like to ask a few questions, because I am losing track of what the role of the Ombudsman is in Ontario. I want to reassure my mind, on the basis of the principle of the law, on what the Ombudsman can get involved in and what kind of mandate he is seeking to investigate complaints into the children's aid society.

The reason I am asking this question is that we heard presentations asking for an external auditor to get involved in the overall issue of the children's aid society: procedure, criteria on which they base their opinions and so on. Am I correct to state that you can get involved, if you get this extension or expanded jurisdiction, only if an individual complaint comes to you after exhausting all the resources of the system it is in, and then you can start the review of the individual case? Am I correct?

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Mrs. Meslin: That is correct.

Mr. Lupusella: Am I also correct that, on reviewing the individual case, you come out with a decision as to whether or not the complaint was reasonable or unreasonable, unfair or unjust, based on the investigation you are going to convey?

Mrs. Meslin: That is right.

Mr. Lupusella: The only problem I have—actually, that is what I had in mind. You are not seeking an extra mandate besides this particular

principle which is emphasized and concretized within the premise and the framework of the present law. That is what you are asking: an expanded jurisdiction to initiate individual complaints coming from the children's aid society.

Mrs. Meslin: Yes.

Mr. Lupusella: When you investigate the case, we heard that most of the decisions taken by the children's aid society are accepted or denied by the courts. Am I correct?

Mrs. Meslin: Most of the decisions?

Mr. Lupusella: The decisions taken by the children's aid society are brought before the court?

Mrs. Meslin: No, not necessarily.

Mr. Lupusella: Not necessarily, but in most cases.

Mrs. Meslin: I do not have those statistics.

Mr. Lupusella: Do you have the statistics?

Mrs. Meslin: I could not say how many were involved, but I think what we were trying to suggest was that although the court process is one aspect, there are many other aspects in which a children's aid society is involved that we could investigate, as Ms. Vogl said, after a court decision when something else is occurring—the child is in care—or looking at the way in which decisions by the children's aid society had come about, etc.

Mr. Lupusella: I understand that, so maybe our research officer can get some statistical data to find out how many cases are brought before the court from the children's aid society. We do not have these statistics; perhaps we can get them.

Going back to this premise, to this principle of decisions taken by the court, are you going to investigate as well the decisions made by judges?

Mrs. Meslin: No, that is not our intention.

Mr. Lupusella: Where does your role end?

Mrs. Meslin: No, that is not our intention.

Mr. Lupusella: Not your intention.

Mrs. Meslin: We would not investigate a judge's decision at all.

Mr. Lupusella: Then would you investigate cases that will end prior to the time when the case is brought before the court, or you do not get involved in these cases at all?

Mrs. Meslin: As I think Mr. Zacks said yesterday, when a court procedure is ongoing, we generally stay away from it. However, there are a lot of other issues that are involved, both before and after the court procedure, in which we would get involved.

We may, for instance, involve ourselves simultaneously, although that is very rare, with a particular issue that is not before the court, nor would it be before the court. Very often you get a problem and you look at it and you say: "Ah, the court is deciding this issue, but this issue has nothing to do with the court. Therefore, we will be investigating almost in tandem with the court."

Ms. Vogl: Would it help if I give an example?

Mrs. Meslin: Sure.

Ms. Vogl: Courts determine, for example, whether a child will be a society ward or whether a child will be returned home, and one of the things a judge will look at is the merits of the plan being presented by an agency versus the merits of the plan being proposed by parents or other extended family members. But they do not, strictly speaking, get into really nitty-gritty issues about placement.

Let's say an order has been made for 12 months' wardship for a family. Maybe there was an intention to place the kids together and maybe they were placed together, but there is a breakdown of the foster home, so these children have to be replaced. The question is, do you place them together or do you separate them? Obviously, they would try to place them together, but maybe there are some issues about which of the foster homes is more appropriate for these children.

These are not issues that you could easily bring before a court, because they are not really the issues that the Child and Family Services Act sets out as being the jurisdiction of the courts. The courts are limited to looking at very specific issues having to do with whether or not a child is in need of protection and what disposition is in the best interests of the child. But that has to do with supervision, wardship, crown wardship; it does not have to do with the finer points. We have a lot of day-to-day practical issues that come up that mean a great deal to the people who are directly involved but might not fit nicely into the court system, according to the legislation.

Mr. Lupusella: I understand. Just going back a little bit to the example you used previously in the course of your presentation, about the four children belonging to the same family and being spread or scattered in each corner of the province or the city and so on, my concern is, if the Ombudsman were to get involved in this particular issue, what kind of help could these children get until the investigation is initiated and the review of their practices is done?

It may be that another six or seven months are going to elapse. I do not know what kind of help these children can get as a result of the Ombudsman's involvement. The Ombudsman can get involved on the individual case. I hope that you are going to eliminate the misconception, which I gathered as a result of your presentation, that the Ombudsman is going to act really as an external auditor to review the children's aid society, its policies and so on. They have to act on the individual cases.

Mrs. Meslin: That does not necessarily mean, though, that the Ombudsman could not do at any particular time a systemic investigation of the way in which a process is handled. The Ombudsman can investigate on his own motion without having a case.

Mr. Lupusella: Yes, I understand; yes, if the problem is an acute one. Based on the statistical data that we got, it appears that the number of complaints coming from the societies is not so extremely high as to prompt an investigation as such. If I had to compare, for example, the children's aid society and the Workers' Compensation Board, I think I would place three or four investigations into the Workers' Compensation Board with one into the children's aid societies. We are not faced with a problem that is severe enough to prompt the Ombudsman to get involved in this type of investigation, as far as the complaints are concerned.

Mrs. Meslin: I think we do not know that. We are saying, and I think Ms. Vogl has said, that the statistics we have may not really be as revealing of the problems as might be obvious if there were an external review.

Mr. Pollock: In your brief you mention the fact that if the Ombudsman extends jurisdiction over the children's aid societies, he in turn should extend jurisdiction to all those people who provide services to children. I take it that you mean foster parents, day care centres, halfway houses, all those? Does the Ombudsman not have jurisdiction over halfway houses right now because are they not funded 100 per cent by the Ministry of Community and Social Services?

Mr. Zacks: Do you mean halfway houses in the Ministry of Correctional Services? There are no halfway houses for young offenders. There are halfway houses for adult offenders where the ministry places these people to serve out the remainder of their sentences. They are called community resource centres, sort of. We investigate complaints pertaining to the inmate, a complaint that an inmate makes, while he is in a community resource centre, against one of the administrators of the centre. We do not investigate administrative matters between employees at the centre and their management. We try to distinguish. We look only at complaints of inmates as they relate to their treatment in the centre. Those are the only halfway houses I am aware of.

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Mr. Pollock: Yes, but there are other places out there that are funded by the Ministry of Community and Social Services, right?

Mr. Zacks: Yes, there are.

Mr. Pollock: Do other people want to comment on that? Is that what you meant by extending jurisdiction over all those areas?

Mr. Weagant: Yes. My friend here said this morning that the Ombudsman already assumes jurisdiction in some cases, depending on how close they think the particular organization or resource is to the ministry. My reply to that is, if you already feel you have the jurisdiction to step into transfer-payment organizations and field complaints, what are we all doing here? The children's aid society is just another transfer-payment organization.

Mr. Pollock: Not 100 per cent.

Mr. Weagant: They are so carefully regulated by the provincial government that they could be seen as an agency of the provincial government. Every aspect of the operation of a children's aid society is subject to the scrutiny of this piece of legislation.

If that is not close enough to the government to warrant review, I query

something such as a community resource with a community board and maybe community funding, and whether the Ombudsman now can step in and field a complaint there. I do not think so. It is a really unclear question as to what constitutes a reviewable community resource.

Certainly the directly operated facilities are reviewable, but by far, most of the resources are not directly operated. What I was saying was that the children's aid society operates a few resources itself and relies on all of these other ones for placements.

You cannot get at, from the consumers' point of view and from the kids' point of view, what is going on in there through the internal complaint mechanism in the CAS because it is a purchase service. It is subject to its own licensing agreement and its own internal complaints and whatever, if there is an internal complaint procedure over there.

What we are saying is that it is really just half a loaf if it is clarified that the Ombudsman can review children's aid society decisions because there are other organizations that pick up in the process. It is not clear at all whether the Ombudsman can now step in. Does that help you?

Mr. Pollock: Basically, yes. It is my understanding that children's aid societies are funded 80 per cent by the province and 20 per cent by local municipalities. But there are, I am sure, other outlets such as halfway houses and some special schools that are funded by Comsoc and by the Ministry of Correctional Services. I believe they would have jurisdiction when they are 100 per cent funded by those ministries.

Mr. Weagant: If they are directly operated, but you have to remember that, as I have said, there is transfer payment and there is transfer payment. You can trace the money from my organization back to the Attorney General. I do not think that the decision that we make is reviewable by the Ombudsman. I think that you have to remember that the ministry abdicates control of these resources after it writes the cheque. It reviews the program once a year with the licensing agreement, but that is it.

Some resources sell their services to more than one ministry. You may have a group home that has two beds that it sells to Comsoc for the purposes of probation, two beds it uses for children's aid societies, two beds it uses for children's aid societies from out of the province, and that kind of thing. It is not clear in my mind that the Ombudsman can step in those cases just because Comsoc is writing the cheque in the first place.

Mr. Pollock: Would you clarify that? You are not sure now that he could step in. In fact, he cannot step in right now. But if he got expanded jurisdiction over the children's aid societies—and of course those operations are funded by other ministries—then he should have almost full jurisdiction with the exception possibly of day care, and that sort of thing.

Mr. Weagant: If the test is where the money comes from—and there is also the element of control by legislation—I would say that we do not need to be having these hearings. If that is the simple test, he should already be able to go and take a look at the children's aid societies.

Mr. Pollock: They do not.

Madam Chairman: Unfortunately, that is not the test. If you want to know the test, we could certainly provide that for you.

I do not see any more questions from the committee, and in any event, our time has expired. We really appreciate your coming before us today. I think all committee members will agree that you had a well-reasoned, great, informative presentation, and I think we have all really benefited from your coming before us today. I know you were in attendance yesterday, so it allowed you to make some comparisons. I think that was particularly helpful for us today. Thank you very much. We will certainly be deliberating over this over the next six or eight weeks. We appreciate your coming before us.

We do apologize for going overtime, but we started just a bit late this morning and that has caused a bit of a backlog. We appreciate your patience.

We have now the Ontario Hospital Association, and Mr. Cunningham is president. I see other people; if you could kindly identify yourself and your position within the association, then we would ask that you do your presentation. I note that we have a format in front of us, so you could identify yourselves first and then commence your presentation.

ONTARIO HOSPITAL ASSOCIATION

Mr. Cunningham: I am Gordon Cunningham, the president of the Ontario Hospital Association. We represent all of the hospitals of Ontario, and we come this morning to see if we can be at your service to respond or to speak on behalf of those hospitals.

We do have a written presentation, but I have with me three people.

Because hospitals are separately incorporated and each one is governed by a board of trustees or a board of governors, there is a governing body for each hospital. I thought we should bring with us someone who could explain that function, if it is necessary.

On my right is Hilary Short. Hilary Short is general manager of our public affairs department. She is a long-time employee of the association. During her time working with hospitals, she has developed considerable expertise on the question of how hospitals are governed, the function of the board, and in the beginning, Hilary will make a presentation on that board structure.

Recognizing that our patients come into our hospitals under stress because of their illness or because of their injury, and their families are under stress, we have built into the hospital system many protections for the patient and many systems which address possible complaints. We do clearly understand, we have tried to study the role of the Ombudsman and the service that he and his office bring to the people of Ontario, and as we understand it, this morning you are considering whether that should be extended into hospitals. We thought it might be helpful if we could outline for you those protections that presently exist.

On my immediate left, Carolyn Shushelski is the general manager of our legislation services. Carolyn is a health care practitioner. She served for many years served as a nurse in one of our hospitals, then trained in the law. She is an expert in health and law. One of the senior members of our staff, she works with the legislative process and she is able to bring in her presentation this morning those mechanisms which exist in hospitals.

Next to her we have Laurie Weinper. I had never met Laurie until this morning, other than by telephone. Laurie is a patient representative at Mount

Sinai Hospital. I understand that in some of the earlier discussions there has been talk of what a patient representative does. She comes from a hospital which has an outstanding program. She is expert on that subject. She did not come to make a presentation. However, she is familiar with patient representative programs in other hospitals and she is fully prepared to respond if you have any questions. Madam Chairman, having introduced those people, I think in our presentation if we heard Hilary Short on the functioning of the board and then Carolyn Shushelski on the functioning of the system with respect to complaints, that might suit your purpose.

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Madam Chairman: That would be quite acceptable.

Ms. Short: I will briefly talk about the role of the hospital board. You have a presentation in front of you and I would like to go through it, then of course we will be pleased to answer all the questions you have.

The boards of trustees of public hospitals in Ontario are responsible and accountable to the community for governing and managing their institutions and for the quality of the patient care provided there. Among the board's responsibilities are such things as determining the hospital services needed in the community; approving the budget for the institution and deciding on the appropriate allocations within the institution; making sure the utilization of resources is appropriate, that they manage the resources effectively; and also their responsibility is to maintain a safe environment for the patients, employees and visitors to the institution. In addition, a very important function they have is appointing or reappointing physicians to the medical staff of the hospital.

In carrying out its responsibilities, the board of trustees receives a wide range of information from a number of different sources and of course uses the knowledge and expertise needed to handle a specific issue. For example, when deciding whether to appoint or reappoint a physician to the medical staff of a hospital, the board of trustees receives recommendations from the credentials committee and the medical advisory committee of the hospital. If the board decides not to grant privileges to a particular physician, the Public Hospitals Act provides that a physician can have a hearing before the hospital board. If the physician wishes, he or she can then appeal that decision to the hospital appeal board and there is a further right of appeal to the Divisional Court.

A very important function of the board is ensuring that quality assurance is carried out. The quality assurance committee of the board reviews the quality of the care provided in the hospital and reports back to the board. The board decides what, if any, changes are needed as a result of the work of the quality assurance committee in order to improve conditions of patient care or for employees and visitors to the hospital. Quality assurance is a requirement for accreditation under the Canadian Council on Health Facilities Accreditation. Accreditation is a voluntary process, but its standards are aspired to and attained by almost all the hospitals in Ontario; 98 per cent of all the hospital beds are in accredited facilities.

Hospital trustees serve on a voluntary basis. Most are elected and are directly accountable to the community. Hospitals are not governmental organizations or government agencies. When carrying out their responsibilities, boards of trustees base their decisions on the resources available to them and the needs of the communities. Day-to-day management of

the hospital is delegated to a salaried chief executive officer.

The board is responsible for deciding what services will be made available to patients and for allocating funds appropriately. The actual provision of medical care, of course, is the responsibility of the organized medical staff, most of whom are not employed by the hospital but are granted privileges by the board to practise there. Neither the employees of the hospital nor members of the medical staff with privileges are public servants.

I will speak briefly about how board policy is developed because this has an impact on what you are discussing. The board of trustees of a hospital is responsible for setting policy for the institution. The board receives recommendations from various committees of the hospital, including the medical advisory committee, and it reviews recommendations from the management team depending on the specific issue that is to be decided. The board, of course, represents the community and members of the board have a wide variety of background and experience.

Hospitals are very complex institutions and provide specialized and unique services. The decision-making process, as you have already heard, is multifaceted and involves the interaction of many different health professionals, including physicians and nurses. It also involves administration and the lay members of the board. So the decision-making process is very complex, and numerous committees and systems have been set up within the hospital to cope with this rather unique structure found in the hospital.

Decisions that a hospital board takes have to take into account many factors, including medical and nursing care and the ethical, administrative, financial and legal aspects of the matters they are discussing.

We would like to draw the committee's attention to the complexity of the system, because in considering expanding the jurisdiction of the Ombudsman, he would have to recognize that every hospital is different. There are many different issues of concern to small, medium and large hospitals, and the office would need to have appropriate professional resources available, similar to those that already exist in the hospital, to ensure that the review process would be adequate. I suspect that the human and financial resources required by the Ombudsman's office to handle this kind of workload would be considerable.

I think we all recognize that Ontario's health care system is considered to be one of the best in the world, and considerable credit for this should be given to the existing structure of community boards managing our public hospitals. The members of the Ontario Hospital Association, our hospitals in Ontario, their boards, administrations and medical staffs are committed to continually improving standards of patient care and management and looking at their policies and programs.

Carolyn Shushelski will now talk about some of the existing review processes that deal with complaints against the public hospitals.

Ms. Shushelski: In dealing with the systems that are available in the public hospitals themselves, it is worthwhile just noting that the boards of public hospitals are in fact corporations without share capital. The fact that they are corporations with a board of directors or trustees gives them the rights and responsibilities of a natural person. In that regard, the board of directors of a hospital, with its responsibilities to the community, is

aware that it is accountable to the community. The Public Hospitals Act sets out that it is the board of directors that will manage the affairs of the corporation. As well, the Corporations Act itself states that the board of directors is the group that manages the affairs of the corporation.

There are approximately 222 public hospitals in Ontario. Of those 222 hospitals, approximately 70 are psychiatric facilities. There are an additional 10 psychiatric facilities that are run by the government; however, they are not part of the public hospital system. The 70 psychiatric facilities within our public hospital system are governed by the Mental Health Act. However, the 222 facilities collectively are actually governed by the Public Hospitals Act. You can have one institution that has a psychiatric facility actually governed by the two different acts.

In that respect, you can have the medical records of the patient being determined by one act and the clinical records of the psychiatric patient being under the jurisdiction of the Mental Health Act. In some respects, not everyone who is not part of the public hospital system quite understands that, and some confusion arises because of the fact that, in one respect, one group of patients has certain access to records whereas another group does not. There are reasons for that. I will not go into it right now. However, I just wanted to clarify that one particular division for what we are going to review later on in this presentation.

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We agree that there is no single review process for patients to seek redress for any complaint that they may have. However, we do feel that the hospitals offer several avenues to the individual patients with respect to any problems they may encounter while they are in our institutions. First of all, many patients may not even be aware that the hospital is run by a board.

Very often, when patients are admitted to the hospital, it is a frightening experience for them. They may not even realize that the head nurse, the chief of staff and the chief of department are actually there to assist them. In that regard, a patient representative program can be very useful in that the patient representative at the hospital can approach the patients who are having difficulties and explain that there are certain individuals they can speak to who may be able to answer the problems.

Very often our patients' complaints arise because of a lack of understanding of what is actually happening to them in the institution. We are trying to address that problem through the patient representative programs.

One instance that we wish to draw to your attention is under the Public Hospitals Act. The public hospitals themselves are not part of the government; they are not a government organization. The board is really the group that manages the hospital and is accountable to the public. However, there is a provision in the Public Hospitals Act that gives the government the authority to intervene if there are serious concerns about the management of a hospital or the quality of patient care in a hospital.

The Public Hospitals Act provides that the Lieutenant Governor in Council may appoint one or more persons to investigate the management and administration of a hospital and the quality of the care and treatment of patients in the hospital. The Lieutenant Governor in Council may appoint a hospital supervisor where, having regard to the content of the report of an investigation, the Lieutenant Governor in Council is of the opinion that the

appointment is in the best interest of the public.

When a supervisor is appointed to a hospital, he or she provides advice and guidance to the board and administration of the hospital for the purpose of improving the quality of the management and administration of the hospital and the care and treatment of patients. This is something that is invoked infrequently. It is rare that a supervisor is ever sent into the hospital. There may be investigations that take place by the investigators. However, it has happened only twice in the last seven or eight years; so it is very infrequent. Nevertheless, that particular mechanism is available and it is a legislated provision.

From our point of view the boards, in being accountable to the public, perform their duty very well. With respect to the public interest, we feel this overriding legislative provision is adequate protection for the public. Should a supervisor ever be sent in to a particular hospital, he or she then, of course, reports to the Minister of Health on that particular aspect.

With respect to the hospital board and the decisions it makes, some of the issues that may come forward to the board are issues with respect to patient complaints. There may be issues in the trends as to how patient care is developing. The board of a hospital actually makes a decision as to whether to grant privileges to particular physicians in the hospital. However, whatever matters the hospital board may be dealing with, very often they have clinical implications, and rarely would the decisions be made totally in isolation of the health care staff.

In that respect, hospitals have many committees that make recommendations to the boards. There is the medical advisory committee, the credentials committee, the patient care committee, the quality assurance committee and I could go on. All of these committees are working all the time in the hospitals to improve patient care and to ensure that we have really excellent health care services in our hospital.

As far as patient complaints about a particular professional staff member are concerned, there is an avenue for patients to make a complaint to the particular professional regulatory body. These decisions can be appealed to the Health Disciplines Board, and the procedure for the investigation and the appeal of the matter is provided for in the Health Disciplines Act.

The health disciplines governed at the present time by the Health Disciplines Act are dentistry, medicine, nursing, optometry and pharmacy. I would like to mention as well that at this time Alan Schwartz, for the Ministry of Health, is actually involved in the health legislation review process. We are expecting eventually that there should be legislation drafted on that where he has actually reviewed all the particular health professions in Ontario. This group of professionals may actually be expanded in the future; so we have yet to see. If that were the case, that would be a further avenue for our public and patients.

With respect to the legal system itself, all patients who feel they have been injured or suffered loss because of the negligence of the hospital or the professional staff at the hospital can of course seek redress through the court system. That is their fundamental right.

We have unionized employees in the hospital and we have nonunion employees. For unionized employees there is the grievance process where a particular employee has a complaint against the employer.

There is one other area we would like to mention, and it deals again with the employee-employer relationships. The Occupational Health and Safety Act sets out provisions with respect to health and safety in the workplace. One of the safeguards in that act is that the employee who believes there is a danger to him, or I suppose it could be to anyone else in the facility, can make a complaint. The complaint can ultimately be received at the Ministry of Labour, which can send in an inspector if it feels there is a contravention of the act and the contravention may lead to a danger to another individual or to that worker. So there is that safeguard as well that employees have.

For any complaints about discrimination, the avenue of the Ontario Human Rights Commission is available.

I would just like to mention one thing as far as the Ontario Hospital Association goes. The Ontario Hospital Association is an organization that provides services to the 222 hospitals in Ontario, and there are several other health care facilities that are members of our organization, so there are approximately 500.

Very often the Ontario Hospital Association will review issues that are of concern on a provincial level and in a sense provide guidelines, or at least information, to our hospitals. Recently we just went through that exercise, and we have released a document on acquired immune deficiency syndrome. Many of these issues we try to address in giving some assistance to hospitals on how to approach the specific issues that have been of concern to some of our AIDS patients, particularly in the area where they felt they were discriminated against. I think our document has tried to address that.

There is one area that I would like to review again. I mentioned that the psychiatric facilities in our hospitals are governed by the Mental Health Act. Under the Mental Health Act, patients have certain rights. When they are going to be detained in a psychiatric facility, they are admitted as involuntary patients. Section 30a of the Mental Health Act provides that if a patient is admitted involuntarily to a psychiatric facility, both the patient and the legal aid director are to be notified of that admission. Further, there is notice given to the patient that he or she has been detained and has the right to legal counsel.

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There are other provisions under section 30a that give the patient notice of the fact that he or she has been deemed mentally incompetent. With respect to treatment and access to clinical records, patients have the right to be notified of the fact they have been deemed mentally incompetent. They may have access to the review board to review that determination of mental incompetence.

The Mental Health Act has all these provisions because of the fact that people are admitted to the psychiatric facilities involuntarily on occasion. Your rights are seen to be taken away from you and you are detained against your will. However, in the public part of the hospital, people are there because they are ill and they need treatment and care; it is a bit of a different scenario for them. So we do not have those kinds of rights, if you want to say that.

The last thing I guess I would like say is that most health care professionals go into the profession because they do really want to help people. Physicians, nurses and other health care professionals act as

advocates for good patient care. They are committed to the provision of safe and effective care in recognition and respect of individuals' needs and rights.

In Ontario, there is a trend towards patient representative programs. There are approximately 23 hospitals which have reported that they have instituted such programs in the hospital. The patient representative represents the patient and family and acts as an intermediary between the patient and the hospital.

For example, in Toronto's Mount Sinai Hospital, the duties of the patient representative are as follows: to facilitate the complaint resolution process; to investigate and direct inquiries and concerns to appropriate hospital staff; to interpret hospital policies and procedures and direct patients to appropriate services and resources; to contribute to the development of policies, procedures and programs at the departmental, hospital-wide level; to collect data and channel information regarding patient care issues to appropriate staff in order to make recommendations for changes in hospital policies and procedures; to evaluate the level of patient satisfaction and identify trends, issues and problems through activities such as monitoring concerns, conducting surveys and interviews; and to work co-operatively with all hospital staff in an effort to enhance communication and humanize the hospital experience for patients and their families.

I have read out the policy for the program at the Mount Sinai Hospital. We have with us today Laurie Weinper, who is a patient representative at the Mount Sinai Hospital. She would be happy to answer any questions that you may have of her with respect to the program.

Mr. Philip: I have some questions for Laurie Weinper. Before I ask them, I have a general question. If I were a patient in the psychiatric ward of the Etobicoke General Hospital, would you agree that under the present system I would not have recourse to either a patient advocate system or the Ombudsman?

Ms. Shushelski: In the public hospital?

Mr. Philip: Yes.

Ms. Shushelski: No, but if you were admitted involuntarily under a certificate of—

Mr. Philip: I understand that. So if I have a complaint and I happen to be in the psychiatric ward at the Etobicoke General Hospital, I do not have the advocacy system or the independent investigatory system that I would have if I were the same patient with the same degree of illness at a provincial hospital.

Ms. Shushelski: Yes; that is right.

Mr. Philip: Do you not see that there is a basic unfairness? Why should the same patient have different rights in one system than in the other? Indeed, when I talk to many of the people who have been through the system, very often they may be in the provincial hospital during one bout of regression and in the Etobicoke General Hospital the next time out. It depends on where they can get in at the particular time that they become ill.

Mr. Cunningham: Carolyn has answered that question. Mr. Philip is right that there is a different system. However, as we explained earlier,

there is a board of directors, which is clearly accountable.

I happened to be in the Etobicoke General Hospital—a very excellent hospital—last evening on another matter, and I raised the question with them, "Do you have a patient representative?" They said: "No. We have a system when a complaint is received from a patient that it does not go to administration; it goes to a special committee of the board for consideration." I think it is the public relations committee. So they do have an accountable body there, which does not exist in the mental hospitals.

Mr. Philip: Would it surprise you that I have sat on that board for 14 years come October and that I have never had one complaint that has gone to the board. They may have gone to committees of the board, but I have never had one patient complaint that has gone to the board.

Mr. Cunningham: I was assured last evening that it was a committee of the board.

Mr. Philip: Would it surprise you that all the complaints I can remember that have gone to the board have always been of a professional nature, that of a doctor wanting privileges and being denied them, a doctor being disbarred from the use of the hospital facilities or a chiropractor wishing access or privileges or something like that? I cannot remember any case in which the complainant ever actually had an audience with the board.

I am sure my board is no different from the others. I think that we have excellent people on our board and that we have done some good administrative things in terms of the hospital and in terms of the financing and worrying about the business aspect of running the hospital. Do you really think the average Mrs. McGillicuddy who has a complaint in the hospital is going to get any kind of satisfaction from that board, or indeed is going to use it? They have not used it in 14 years.

I know of a number of complaints against the hospital. I am sure—at least I hope—there are a lot more complaints against other hospitals than against ours, but I have sent complaints to the administration and they have always been dealt with at an administrative level.

Mr. Cunningham: I can only take the word of the administrator last evening, who assured me that he does not deal with them. His view was that they go to the public relations committee. I cannot give you other than what I have heard, but there is a board there that does not exist in the psychiatric hospitals.

Mr. Philip: Ms. Weinper, would there be any other hospital in the province that would have a similar program to the one you have at Mount Sinai?

Ms. Weinper: As far as I am aware, several of the Toronto major hospitals do have programs that parallel ours. Our program at Mount Sinai Hospital was originated in 1974. I believe it was the first program of its kind in the province. Since that time, many hospitals in Ontario, particularly in Toronto, have modelled their own programs after our own. I would have to say that. As far as I know, there are many patient representative programs that are very similar to the one I have in my hospital.

Ms. Short: We know of at least 24.

Mr. Philip: There are at least 24, and how many hospitals? You gave

us that figure.

Ms. Short: There are 222.

Mr. Philip: Only a little more than 10 per cent of the hospitals in fact have any kind of advocacy program similar to yours at the present time.

Ms. Weinper: Yes. In the last few years, I have seen an increasing number of hospitals expressing an interest, sending myself and other hospitals requests for information on how a program is run so that they can begin their own programs.

Mr. Philip: Would you agree that there is a difference between an advocacy program in which you are taking a side, namely, the side of the complainant, and an ombudsman program where you have an independent investigator who does not take sides but tries to find out which one is right, either the complainant, the hospital or the hospital staff?

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Ms. Weinper: Just to give you an example of my own program, I represent both the patient and the hospital. All complaints are investigated with that backdrop, but in my program we are encouraging patients to be their own advocates and to deal with concerns and complaints at the bedside, where the problems usually begin. We encourage them to deal with the primary care givers, and in that sense we are helping them be their own advocates.

Mr. Philip: What percentage of the people you advocate on behalf of would have a solution resolved in their favour rather than in the favour of the hospital or the administration?

Ms. Weinper: I could not give you a percentage offhand to that question.

Mr. Philip: Is it safe to say that if you became very effective, since your salary is paid by the administration, the administration might not look too favourably on your success rate?

Ms. Weinper: Again, I am speaking for my hospital. It is very important that I do have a good success rate, and as far as I am aware, our program does. Our hospital would like to be aware of any problems, particularly related to patient care issues. It is important that they are aware of the kinds of concerns and complaints patients in the hospital have in order for them to make recommendations for changes, if at all possible.

Ms. Short: It has been our experience, if I may add another gem, that many of the kinds of complaints that come up in a hospital simply are not ones that can be adjudicated one way or another. Many of them tend to boil down, as the health disciplines cases do, to a lack of communication somewhere along the line, or a lack of understanding or somebody has not explained something to a patient. Very often, for the person in hospital it is not a question of having an investigation with somebody coming down on one side or the other so much as an explanation to the person of what is happening or the reasons something has happened.

Mr. Philip: I have talked to a number of health practitioners, not the least of whom is my wife, and they present the view that they feel that if there is an accusation which they consider unfair, they would much rather have

somebody outside, like the Ombudsman, investigate so that when they are cleared there is no doubt that they were right and that the complaint was not well-founded.

My question to you is, have you done any kind of checking with the people who are on the front line in the hospitals? My suspicion is that if you did, the majority of the front-line people, and I am talking about nurses and even doctors, would probably prefer an independent inquiry when there are any accusations made.

Mr. Cunningham: I would respond to that that as the system has evolved over this century, with accreditation, with quality assurance, that type of thing, the health professionals have been involved. The Canadian Council on Health Facilities Accreditation is represented by the Canadian Medical Association and the Canadian Nurses Association. I would say that the hospitals, including the association in its guidelines, do involve the health professionals.

Dealing with this very difficult question of acquired immune deficiency syndrome where we want to protect each individual, we clearly have a strong team of microbiologists, people in the medical profession delivering care on AIDS, people in the nursing profession. We do involve the professionals. I would answer in the affirmative.

Mr. Philip: In the affirmative that they would prefer to have the Ombudsman look into—

Mr. Cunningham: No. I thought the question was, had the system involved the professionals? I would say it does.

Mr. Philip: No. I asked whether you have consulted the professionals on whether or not they would prefer to have an independent adjudication, such as the right of the Ombudsman to have jurisdiction to investigate complaints.

Mr. Cunningham: I have not specifically asked, but I have found the obverse of that. I have found that the health professions wish to be very much a part of the quality assurance process, that they want to see each individual cared for and looked after. They have given affirmative action where they have taken part in the process of making sure there are avenues to look at the complaints of those people under stress.

Mr. Philip: I do not doubt that and I think they are to be credited for it. Your work also is commendable, but I do not quite see it as the same issue. Thank you very much for an interesting presentation.

Mr. Henderson: I had the doubtful pleasure a few years ago of being responsible for ensuring that the provisions of the Mental Health Act were observed in a particular hospital. There was a question then that I never got an answer to, and I am going to try again this morning. The listing of the psychiatric aspect of general hospitals never said "Psychiatric Unit of Hospital X." It always just said "Hospital X." What I want to know is whether patients who are in some sense psychiatric patients in that hospital, but are not on the psychiatric unit, fall under or are protected by the provisions of the Mental Health Act.

Ms. Shushelski: I will attempt to answer that. That is a very difficult question. When it comes to public hospitals, some have argued that once you are deemed a psychiatric facility for the purposes of the Mental

Health Act, everybody in that facility is in a psychiatric facility, but that could not work in fact because the patient who is in for an appendectomy cannot be under the Mental Health Act. So whenever a patient is admitted to the hospital, is admitted to a psychiatric facility, wherever they are in that facility in fact is the psychiatric facility for the purposes of the Mental Health Act.

Maybe I am not answering your question. If you are admitted, let's say, for an appendectomy and in the course of that care and treatment you have a psychiatric crisis, where do you fall in the scheme? Is that the question?

Mr. Henderson: You are putting your finger on what I think is the heart of the issue; that is, where do you draw the line? If you are admitted for an appendectomy, that sounds like a pretty nonpsychiatric kind of thing, but what if you are admitted because a month after a parent died your ulcerative colitis flared up and you perforated an ulcer and you had to have abdominal surgery, and there very clearly is a whole lot of emotional stuff going on which is part and parcel of the primary diagnosis and treatment program?

The example I just picked is not a good example because that patient might not need the protection of the Mental Health Act, but some do, and if I thought about it for a while I could cook up an example that would illustrate that, I think. I am trying to understand whether other patients in the general hospital indeed ought not to have the same protections that psychiatric patients have under the Mental Health Act.

Ms. Shushelski: Many of the protections under the Mental Health Act really revolve around the fact that a patient is often being detained against his will, involuntarily.

Mr. Henderson: Some do, but a lot of them have nothing to do with being involuntary.

Ms. Shushelski: Some of them are voluntary, that is true, but many of the aspects where you have all the review board processes and the right to legal counsel are really dealing with the individuals who have either been deemed mentally incompetent or who have been admitted involuntarily to that institution.

Mr. Henderson: But the vast majority of patients in the psychiatric units are not involuntary. They are voluntary patients perfectly analogous to any other hospital patient and they have those protections. Why should not all patients in the hospital?

Ms. Shushelski: I think we should look at what the protections are because I am not convinced totally that all patients do not have, to an extent.

Mr. Henderson: The right to record examination, for example.

Ms. Shushelski: A right to see the record? The Public Hospitals Act does provide for a right to your record. In the public hospital, if you want to see your medical record, you have a right to see your medical record. It is on your consent. The provisions are in regulation 865. The fact is that the Mental Health Act was made at a different time from the Public Hospitals Act. I guess they were never streamlined together, for good reasons I expect, but if you really analyse what goes on with the medical record in the hospital, it is not that much different from what goes on with the clinical record of the

psychiatric patient in that same hospital.

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If you look at the provisions under the Mental Health Act that deal with the release of a clinical record, even if you are consenting to the release of that record and you are a psychiatric patient, the administration and physician still have the right to withhold it if they believe there is a danger to another person or to yourself. That is a provision of the act. Under the Public Hospitals Act generally, I think most hospitals go by the policy that if you want your record and you consent to it or your representative consents, they release it. However, the physician still reviews it to make sure no danger will come to yourself or another by finding out some of the information. That is standard practice.

Mr. Henderson: If an ordinary subpoena comes to a hospital for a clinical record, if it is a psychiatric patient, the answer is no. If it is any other kind of patient, I should think the answer would be, "Sure, here's the record," would it not?

Ms. Shushelski: If a subpoena comes to the hospital about a psychiatric patient, the answer is no.

Mr. Henderson: An ordinary subpoena?

Ms. Shushelski: Well, I think the provision is that they will look at it to see that there is no harm to anyone else. I think that is the provision. We would have to get the act out and look it up.

Mr. Henderson: Yes. I guess we are getting into more detail than we really need to.

Ms. Shushelski: I do not think it is that much different in both acts, if you really analyse both of them.

Mr. Henderson: We might end up not quite agreeing on that point.

Ms. Shushelski: Well, that is possible.

Mr. Henderson: The other question I had is really something that Mr. Philip was getting at, I think, but I want to put this question in a little different way. It always seems to me that human nature being what it is, and group dynamics and institutions being what they are, a complaint mechanism within an organization to examine complaints against that organization operates very differently and rather protectively with regard to that organization. I think that is the case whether you are talking about hospitals, corporations, banks or groups of politicians. I think it is a general principle. Do you not think there is a need for some kind of appeal mechanism outside the organization within which the complaint rests or against which, in some sense, the complaint rests?

Mr. Cunningham: I do not think there is any total answer to that question. I respect what the question is, but I would say hospitals, sir, are different from any other corporation in that they exist only for the direct and total being of that person. I want to go back to where I began. We are acutely aware that the people who come into the hospital are under stress. We recognize that and part of the care of a patient is the resolution of that stress. It is not just to look after their appendectomy or their colitis. The

system has built into itself those quality assurances, those things and those avenues for that patient. Laurie Weinper is there not for a long-distance look backwards many months ago into whether something happened; she is there right now to solve it. I think this system has been built to address the care of the patient at that moment because of the nature of its origin.

Mr. Henderson: I hear what you are saying. I understand and I certainly resonate very much with what you are saying, but I also must say I have some doubts. Since I have come to Queen's Park, I have become even more aware than I was before of what very political organizations hospitals can sometimes become and how—although as to what you say about the primary purpose being the welfare of the patient, it is absolutely so—there are all kinds of other interests, and for that matter professional interests, that get set up in the course of doing all that. I think that is what we have to think about as well.

Madam Chairman: I have one question. I see that a number of times through your brief you ask whether extending the jurisdiction of the Ombudsman to public hospitals would create any additional benefit to the public in terms of faster and more effective problem solving or whether it would contribute to an additional level of complexity. I guess you have just asked the question and have outlined a number of avenues that are available.

I guess I always see the Ombudsman's review not necessarily as quick-acting and fast, but rather as sort of an impartial look at the outcome and the issues of the day. He does a comprehensive review and then quite often makes a recommendation that affects the patient or the individual. Then secondarily, he looks at the systemic problems that might be within the system. I do not view it as an additional level of complexity. I just wondered what generated that type of statement.

Ms. Short: Perhaps I can respond just briefly. We are not sure either. We are looking at this issue, trying to be objective, examining the hospitals from the point of view of what avenue patients have and recognizing that problems do occur. None of us would say that hospitals are perfect and the patients do not have problems.

I guess what we have difficulty in coming to grips with is the kinds of problems to which you are alluding. What are the kinds of problems the Ombudsman would solve that the existing avenues do not. Would it really be an additional benefit in terms of the patients? We just are not clear ourselves.

Madam Chairman: Are there any final questions from the committee? Seeing none, thank you very much for coming before us today. It was a very comprehensive presentation. We appreciate your taking the time. It certainly has been helpful to the committee.

We will recess now until 2 p.m., but before we do I just want to tell you of the change of schedule for tomorrow. The afternoon group is the Ontario New Home Warranty Program. They cannot come at 11 a.m. but they have agreed to come at 1 p.m. instead of 2 p.m.

Clerk of the Committee: That is for tomorrow.

Madam Chairman: That is what I am talking about. This is tomorrow we are talking about. Tomorrow we only have one morning group from 10 a.m. to 11 a.m. Then we will recess until 1 p.m. rather than 2 p.m. That will provide an opportunity for those who want to go home to their ridings to have an extra

hour or two there. Perhaps that might be of some help. So just be aware that tomorrow we will recess probably from 11 a.m. until 1 p.m.. We will recess now until 2 p.m.

The committee recessed at 12:08 p.m.

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STANDING COMMITTEE ON THE OMBUDSMAN

EXPANSION OF OMBUDSMAN'S JURISDICTION

WEDNESDAY, AUGUST 24, 1988

Afternoon Sitting



STANDING COMMITTEE ON THE OMBUDSMAN

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Mackenzie, Bob (Hamilton East NDP)

McLean, Allan K. (Simcoe East PC)

Pollock, Jim (Hastings-Peterborough PC)

Substitutions:

McClelland, Carman (Brampton North L) for Mr. MacDonald

Philip, Ed (Etobicoke-Rexdale NDP) for Mr. Mackenzie

Clerk: Carrozza, Franco

Staff:

Wilson, Jennifer, Research Officer, Legislative Research Service

Witnesses:

From the Friends and Advocates Centre Inc.:

Fraser, Theresa, Program Supervisor

Green, Margaret, Chairperson, Social Action Committee

From the Office of the Ombudsman:

Meslin, Eleanor, Executive Director

Zacks, Michael, General Counsel

AFTERNOON SITTING

The committee resumed at 2:04 p.m. in committee room 1.

Madam Chairman: I call the meeting to order. The clerk is just passing around a new agenda for tomorrow reflecting the changes I indicated this morning.

Mr. Philip: I wanted to put on the record, just in case anybody at some point in time in the future might suspect there is a conflict, that I am on the advisory board of the organization that is making the next presentation. For the information of the members and all who are interested, I have not had any input into this brief, and I will be reading it at the same time you are; so I do not feel that I have any bias.

Madam Chairman: Do committee members have any comment on that or anything else?

There being none, we have with us this afternoon Friends and Advocates Centre Inc., and we are discussing expanded jurisdiction of the Ombudsman. There are three representatives from Friends and Advocates, Theresa Fraser, who is the program supervisor—

Mrs. Fraser: Yes.

Madam Chairman: You have taken off your blue jacket.

Mrs. Fraser: Yes.

Madam Chairman: That was tricky. It is the way I was going to focus in.

Margaret Green is a member of the organization, and Marg Oswin is also a member. I understand that you will be making the presentation, Ms. Green.

Ms. Green: Yes, that is right.

Madam Chairman: We will certainly allow you the time to do that, and then the committee will have some questions to ask, I am sure. Start whenever you want.

FRIENDS AND ADVOCATES CENTRE INC.

Ms. Green: I have been selected by the social action committee of Friends and Advocates Centre Inc. to present this brief to you this afternoon.

Friends and Advocates Centre Inc., which is located in Etobicoke, is a nonmedical community mental health program which is consumer directed and has operated very successfully in this way for over 11 years. Offered in the program are a wide range of activities and opportunities for member participation. These opportunities teach socialization skills to maintain members in or integrate them into our community.

Another important aspect of our program is peer support. Fellow members can empathize with the problems which other members have faced or are experiencing. Staff members offer lifestyle counselling and crisis intervention when requested to do so by the members.

Other members find that the program offers an opportunity to speak out on mental health issues and to have an input into implementing change, such as the opportunity afforded here today to express our ideas on the importance of expanding the role of the Ombudsman into the psychiatric wards of general hospitals.

It is unfortunate that once a person reaches the stage where hospitalization is required, even the most confident, articulate and self-assured individuals may become vulnerable and may, in addition, fear being labelled as noncompliant or unco-operative should they disagree with any rule, policy or treatment intervention which will affect them.

There is a feeling of powerlessness which often accompanies the symptoms of their illness, and the feeling extends to their relationships with hospital staff, who are seen as being there as persons being paid to help you, the patient. After all, the patient has learned that the staff are the experts and the ones who have extensive experience.

In many situations, the psychiatric patient is vulnerable to treatment or actions that in the final analysis may not be in his best interest, and he has no resources to call upon to assist him in his predicament.

For example, if a patient is an involuntary patient in a psychiatric ward of a hospital in his own area, the hospital may make the treatment decision to transfer him to another psychiatric facility without his consent, thus putting him in an area which is far away from his supportive network of friends and family. There is no way in which the patient may refuse this transfer. An ombudsman could be helpful in this situation, as he can act as an impartial investigator.

I will proceed to give other examples of instances where the intervention of an ombudsman would have been beneficial.

A mother and daughter were admitted to the psychiatric ward of a general hospital due to a variety of problems in the home situation. The mother responded to treatment more quickly and was discharged prior to her daughter. Unfortunately, the mother was denied visiting privileges to see the daughter because the hospital has a standing rule that former patients cannot visit anyone on a psychiatric floor until a year after he or she is discharged. This unfortunate rule denied the daughter meaningful support that may have hastened her recovery.

Sam M. was admitted to the hospital for physical reasons by his family doctor so that a battery of tests could be completed. Once Sam was admitted to the hospital, he was transferred to the psychiatric ward, as he had previously been treated in that hospital for depression. Although his psychiatric disorder had never manifested itself in physical symptoms, he was nevertheless perceived as a psychiatric patient and remained on the psychiatric floor until his subsequent surgery. After surgery, he was transferred to the medical floor. In this situation, there was no need for him to be placed on the psychiatric ward. Sam M. felt that he was not in a position to question the decision as he might jeopardize his future relationship with the hospital.

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Hopefully, situations such as those described above do not occur often, but if they do while you are a patient on the psychiatric ward of a general hospital, your opportunities for recourse are few. The patient can direct his

complaint to his primary nurse. If this fails, the next obvious step would be the head nurse. Often the head nurse is in an office that is inaccessible to the patients. In addition, a request to see the head nurse will often result in the patient being labelled as noncompliant or unco-operative. When a person is a psychiatric patient in a hospital, he is kept very aware of the power structure of the psychiatric ward. It does not take long to learn that co-operation with the system is seen as the road to discharge.

These situations I have outlined reflect the status of some psychiatric patients while in the psychiatric wards of general hospitals. If these same patients had been in provincial psychiatric facilities, they would have had access not only to patient advocates, who are not in the psychiatric wards of general hospitals, but also to the Ombudsman of Ontario after they had exhausted the internal hospital resources.

Why may the Ombudsman investigate a complaint from a patient in a psychiatric facility operated by the province of Ontario but not investigate a complaint from this same patient, suffering from the same psychiatric disability, if the patient is in the psychiatric ward of a general hospital? Surely there is an imbalance here which is in need of correction.

In this presentation, it is obvious that the individuals' rights to fair treatment have been denied. There is a clear need for an objective, impartial third party to investigate concerns or complaints on behalf of these individuals.

It would not be sufficient just to expand the role of psychiatric patient advocates to the psychiatric wards of general hospitals. Although they could address many minor complaints and could be the first line of approach if there is a case in which a patient's rights are being denied, there is still a clear need for recourse to the Ombudsman, as has been shown in the experience of psychiatric patient advocates in provincial hospitals. Their function is limited as they cannot interview all parties and all sides in an issue. The advocate then has to go to the Ombudsman, who has more resources at his disposal.

In one case taken by the Ombudsman, the internal recommendation of the hospital was found to be unreasonable, and following the Ombudsman's intervention, it was agreed to revise the policy and set up a hospital training program. An advocate could not have access to the sources the Ombudsman had at his disposal and could not correct the wrong. However, the Ombudsman was able to do so. Both advocates and the Ombudsman are necessary.

In the psychiatric wards of general hospitals there are no patient advocates, thus making the need for the expansion of the role of the Ombudsman into the psychiatric wards even greater. We of Friends and Advocates Centre Inc. strongly support the expansion of the jurisdiction of the Ombudsman into the psychiatric wards of general hospitals.

Mr. Philip: Thank you for an interesting brief. From my association with you, I can certainly confirm that you are a completely democratic organization where everyone has the same vote, be he a helper, a volunteer or someone who is just out of a mental hospital and who later often becomes a helper and volunteer.

I did want to deal with a thing we have been addressing this morning, which is that the advocacy system, admirable and helpful as it may be, is quite different from the independent investigatory power of an ombudsman. You

point that out on page 3, where you say, "An advocate could not have access to sources that the Ombudsman had at his disposal and could not correct the wrong."

Have you had experience, because some of your members would have been in the hospitals that have advocates, where the advocate in fact could not gain access to information? Do you have experiences of that?

Mrs. Fraser: Recently, we have not had that experience, but in conversation with other community mental health programs, that is considered an issue, particularly for the patient in a provincial hospital, because the advocate is not seen as being objective because his or her office is in the same facility. He or she has lunch with other staff members of the hospital and therefore is just seen as being familiar with hospital staff.

From a patient's point of view, the advocate is not viewed, generally speaking, as being impartial. There may be a hesitancy on the patient's part to even direct an inquiry to the advocate for fear of getting reprisals from ward staff or the patient's own doctor. Does that answer your question?

Mr. Philip: I appreciate the answer.

Mr. Henderson, who I am sure will be back soon, is a psychiatrist who has worked in the Etobicoke area and has been very supportive of your organization. He made an interesting observation this morning from a medical point of view; that is, it is often very difficult to separate the psychological from the physical.

If I can remember his example—if not, I will give a facsimile—suppose someone has a traumatic event in his life that ends up in an ulcer or a digestive problem. He may be in there for surgery for an ulcer, but he may also have a psychiatric problem as well. Where does one end and one begin? Therefore, maybe the best solution is to have the Ombudsman accessible to all patients, not just patients who are psychiatric patients. Would you agree with that position?

Mrs. Fraser: I would not like to say on behalf of our members that I would agree or disagree, because as you know, it is a democratic program.

Mr. Philip: Do you personally agree with it?

Mrs. Fraser: Personally, yes. If there is a problem, the Ombudsman is not necessarily going to just side with the patient, but the opportunity for him to investigate is there.

Mr. Philip: Regarding the first example you gave of the rule, if I am not mistaken that was one that I wrote to a certain hospital administrator about. I see nods. Was that problem resolved?

Mrs. Fraser: It is in the process.

Mr. Philip: Of being resolved?

Mrs. Fraser: Yes.

Ms. Green: It is ongoing.

Mrs. Fraser: This is just one example of that particular rule at a local hospital. If you have been a patient on that psychiatric ward for a

year, you can be denied visiting rights. Whether it is a family member, a friend or whoever it is on the ward, they can deny it just because you have been there for a year.

That came to the social action committee's attention. We wrote a letter to the hospital administrator, received a copy of the letter and it went through appropriate channels. At that point, a letter was written to the board of governors of the hospital. The chairman of the board of governors referred the issue to the chief psychiatrist, who has sent us a letter requesting a meeting with our program supervisor. Once that happens, hopefully it will go back to the board.

Mr. Philip: One of my experiences with that very hospital is that cases like this rarely make it up to the board. I do not recall any board decision, except perhaps to ratify a subcommittee's decision on whether or not a doctor would have rights, whether or not a chiropractor would have access to a hospital and that kind of thing. There is nothing from a patient point of view.

In your dealings on behalf of complainants, do you find that the boards of hospitals are helpful as a review process?

Mrs. Fraser: I would not say that recently we have had much experience with the boards of hospitals; so the only way I can answer that question is with the example I have already cited. We will have to wait for the outcome. It is a very long and lengthy process which was started, I believe, in January. There is still no answer.

Mr. Philip: You have a membership of 150 or 200 now? What is the latest membership?

Mrs. Fraser: Actually, at this point it is about 107. That includes staff and members of the program.

Mr. Philip: That is just in the Etobicoke branch?

Mrs. Fraser: Yes.

Mr. Philip: Of that membership of 107, how many would be ex-psychiatric or ex-hospitalized for psychiatric? Would it be about half of them?

Mrs. Fraser: As an estimate, I would say more than half. We are a nonmedical program; so when members come to the program—

Mr. Philip: From doctors?

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Mrs. Fraser: Most of our referrals are self-referrals; actually almost 90 per cent are self-referrals. In our intake process, we do not ask people what their psychiatric label is. The focus of the intake process is more: "Where would you like to be in six months or a year from now? What do you want to be working on? What problems do you want to overcome?"

Mr. Philip: I refer people to you all the time and you have a waiting list usually.

Mrs. Fraser: Usually.

Mr. Philip: What I am trying to get at is, how many times would you have a complaint about a hospital from your membership?

Mrs. Fraser: Again, that is a difficult question to answer because from many individuals we can find out about an incident where they feel their rights have been abused but it is too long after the fact for anything to be done, because, as we pointed out in the brief, when you are in the situation on the psychiatric floor and a psychiatric patient, you are not only dealing with your problems, but also the community stigma, the power structure and the feeling the people who are there to help you must know what is right for you, so if you have doubts or questions, they may be totally off base. So a lot of the time members of the program may not even articulate what that problem is until afterwards.

They will say, "This happened to me," and then we can say, "Did you know you have this right, this right and this right?" or "You can respond to this person and this person," and they will say, "No, I did not know that."

Mr. Philip: I guess I am asking the question because we are trying to get a handle on how much of a work increase the Ombudsman might get if we recommended extended jurisdiction over hospitals, and I know that in 14 years come October, as a member of the board of a hospital and as an MPP for the same length of time, I think I have had maybe eight complaints directly about hospitals from a case load of over 4,000 cases a year. I guess what I am saying is that I do not expect there is going to be an enormous increase in cost to the Ombudsman's office. There may be a rush at first, but it should taper off.

Mrs. Fraser: I would agree with you. Initially individuals would probably approach the Ombudsman or request intervention from the Ombudsman until his role is very clearly defined and people are aware what his role is in the hospital but I would not imagine that the work load would be any more increased than what you are suggesting.

Mr. Philip: Thank you very much.

Madam Chairman: Any further questions from the committee?

I am somewhat interested in the Ombudsman's reaction to the role as outlined in page 3. Do you have any comments on that?

Mrs. Meslin: I think we have said before that we find it a striking anomaly that we have the jurisdiction to investigate complaints in provincial psychiatric hospitals but not in psychiatric wards of regular hospitals. We agree, from that point of view certainly, that there does not seem to be a great difference between the two areas. We think any discussion of that expanded jurisdiction should certainly take that into account.

Madam Chairman: I hate to bring this up now, but it was a puzzle. You can both answer at once. This morning, do you recollect when we talked about the medical records—

Mr. Zacks: Yes.

Madam Chairman: And I think there was some allusion to—

Mrs. Meslin: Dr. Henderson's question.

Madam Chairman: Yes, that is right. Our researcher was saying that the Mental Health Act in section 4 seems to override anything that would be in the Public Hospitals Act. It was indicated to us that medical records would be available under the Public Hospitals Act but indeed if they were covered by the Mental Health Act, section 4 overrides that. If you want to respond to my previous question, but indeed—

Mr. Zacks: Why not?

Madam Chairman: If you had an response to that, we did not allow you an opportunity this morning because of the pressing time, and I do not know whether it is pertinent but I think that is the point he was trying to make this morning.

Mr. Zacks: On the question of hospital records themselves, a patient has no legal right to demand his or her hospital records. It is totally discretionary on the part of a hospital administrator. The statute is written in terms of "may." If there is a situation where the hospital may feel that litigation is pending, it has every right to refuse. The only way of getting access is through legal process.

In terms of the Mental Health Act, the patient has a right to apply for access to his clinical records, but that right may be overridden by the attending physician if he or she believes it would be inappropriate to do so. Then there is a mechanism to have that question reviewed through the courts.

The Ombudsman, on the other hand, has complete access to clinical records in the control of provincial psychiatric facilities. There is no difficulty at all in our getting access to those records. There was some discussion, when the Mental Health Act records provisions came in, but they were quickly resolved in our favour.

Mr. Carrothers: Your comment on the records from the public hospitals now confuses me again because what you are saying seems to go against my own personal experience of getting records from hospitals and the comment from the Ontario Hospital Association that they were available.

Mr. Zacks: Their availability may be a matter of administrative practice, but there is no right.

Mr. Carrothers: Then the question might—I do not know; maybe we could debate that because I would have thought there was.

Mr. Zacks: I am not sure this issue is all that relevant to what you are dealing with.

Mr. Carrothers: You key on the word "may" but it is certainly not my experience. With medical records, there is always the difficulty as to whether the patient should see them because of some diagnosis that may be in it. That is an experience I have had around them. There may be some diagnosis of a medical condition, maybe psychiatric, that they do not know and could be damaging. So there is some kind of discretion, but my experience has been that they are available.

Mr. Zacks: In your experience, they may exercise their discretion to disclose but it is discretionary. If you examine the regulations on disclosure

of records, I think you will see that it is a discretionary exercise of the administrator.

Mr. Carrothers: I find that so curious because this morning's comment was very definite.

Mr. Zacks: I was curious about it too, and I looked it up afterwards and discussed it with one of my colleagues and we are both of the view that there is no legal right to insist that the records be given to you and the hospital has the right to refuse.

Mr. Carrothers: I know you have the right to records from your doctor.

Mr. Zacks: My understanding is you have a right to a medical report from your doctor, but the actual records are his or her records. The refusal to give a patient a medical report, I believe, is professional misconduct, but a doctor has no legal obligation to actually hand over his clinical record from his office to the patient. All he has an obligation to do is to compile a report for that patient.

Mr. Carrothers: Or a summary.

Ms. Green: I am not an expert by any means; I am only an ex-psychiatric patient. I recently had a very brief hospitalization and I was rather curious just to find out what their assessment of me was at this particular juncture, and so I filled out a form—I believe it is form 44—under which I can request disclosure of my own clinical record. I have not received it yet, but apparently there is no problem in my getting it. The problem arose in the fact that the resident who was on the ward at the time I was a patient there finished her residency at the end of June and went away at the end of her rota to another assignment and had not finished writing up her records. Therefore my records have not been written up yet, but as soon as they are written up, I will have total and free access to my clinical record.

Theresa can correct me on this one. I think perhaps if there had been a thought that the disclosure of that record might be—they might think that it would put me in danger to myself or cause me to be a danger to others, then they could have refused to disclose that record to me, but since that did not apply in my particular case, as soon as the records are ready, as far as I know, I have total access to them.

Mrs. Fraser: Which is a change.

Ms. Green: This is a change.

Mr. Carrothers: This is not under the Mental Health Act but under the Public Hospitals Act.

Mrs. Fraser: No—

Ms. Green: Under the Mental Health Act.

Mrs. Fraser: Under the new Mental Health Act, the hospitals now are in a position to explain to you why they would refuse your records versus you having to plead—

Mr. Carrothers: The discussion was on the public hospitals. That

seems to be the confusion.

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Mr. Zacks: There is confusion. The other confusing fact in this whole recipe of disclosure is when the Freedom of Information and Protection of Privacy Act kicks in with municipalities in a couple of years, whether hospitals will be included in that as well. That will really confuse everything. I will leave that with you.

Mr. Carrothers: So what else is new?

Mr. Zacks: The only other point I wanted to make about the previous comment in terms of the role of advocates and discrepancy between the Ombudsman's jurisdiction in provincial psychiatric facilities versus public hospital psychiatric facilities is, from my point of view, looking at how the Ombudsman Act operates, there is no great policy reason why we have jurisdiction in one area versus another. When the legislation was first promulgated, there was no clear rationale why we should have jurisdiction in one area and not in another.

It is merely a matter of statutory interpretation why that is and from time to time we get jurisdiction over bodies we previously lacked jurisdiction over for no great policy reason other than a change in name. An example is the assessment review court. Our act says we may not investigate courts. When that body changed its name to "board" from "court," we all of a sudden decided we had jurisdiction and we went into it and investigated. No policy analysis at all; there is nothing, other than the fact that the Ombudsman Act says you cannot look at judges and you cannot look at courts. Here we have some kind of court; something that called itself a court. One day it was a court, the next day it was a board, so we are now investigating that body.

Mr. Carrothers: If I could jump in, you never, sort of, decided whether it was a court. You just went by the name of the thing.

Mr. Zacks: The first Ombudsman took the position that a court is a court is a court and, therefore, if it calls itself a court we are not going to look at it. Mr. Justice Morand, when he was Ombudsman, took the same point of view until the day they called it a board. The reverse occurred with the Lieutenant Governor's Board of Review. One day we had jurisdiction because the authority emanated from the Mental Health Act, the next day it emanated from the Criminal Code. They were doing exactly the same function, operating exactly the same way, processing the same people, making the same decisions, and we lost jurisdiction. There was no policy reason for it, just the change of some constitutional basis.

The point about advocates, I believe advocates perform a very useful function. If I could, I just want to quote from a statement made from—there is pathetic fallacy out there—a brochure from the office of child and family service advocacy which deals with children's aid. In their own leaflet, they talk about this difficulty that has been coming up for the past few days and they are talking about the role they serve. I am quoting now: "There are other people who claim that every staff is an advocate by trade. They are both right and both wrong. Every staff can be an advocate until the conflict of interest demands allegiance to the organization. Sometimes even we, in our privileged role, have to deal with conflict of interest."

This is from a letter or information pamphlet from Les Horne, the

co-ordinator of the office of child and family service advocacy. It is to outline the role and function of that body. So that is a concern. The Ombudsman, of course, is not an advocate until he comes before this body, and at that stage he is advocating his view of what it is. That is consistent with the complainant's view in some cases, and other cases it is not. The complainant may not actually get any benefit. It may be advocating a public interest as opposed to the individual's interest.

Mr. Carrothers: One more question. You mentioned the jurisdiction over psychiatric patients in psychiatric hospitals, but not over the ones in general hospitals. Because we were talking about it, I guess, in this morning's discussion, the Ontario Hospital Association made some distinction based on the way it is organized and administered and the fact that the general hospital is community based, run by boards and that the provincial ones are a little different. Are you then saying you do not really see much in that distinction?

Mr. Zacks: No. I do not. I do not know if the patient who is actually in the hospital would see much of a distinction.

Mr. Carrothers: I can understand the patients, but they were making sort of a distinction on some logic, based on organizational type, if you will.

Mr. Zacks: The mental health process operates the same under the Mental Health Act for both classes of patients, except that in the provincially operated hospitals, the government has introduced another component of the advocates program. But other than that, it operates the same.

Mr. Carrothers: Thank you.

Madam Chairman: Mr. Carrothers, it may sound as though we went off a bit there, but I think a number of us this morning were still grappling with the difference between the psychiatric units in the hospitals and not. I think that clarified it a bit.

Mr. Elliot: I have a request to make but, before I make it, I would like to thank you very much for coming. I found your brief particularly helpful, as a couple of the other people who have testified have been very helpful, in giving us specific examples of where individuals have not been satisfied by the system that is presently set up.

The kind of information we are gathering now is really significant to someone like myself who really is not aware of the composition of the hospital structure in Ontario. For example, we were told this morning that of the 222 hospitals, 70 of the public ones are psychiatric in nature. Then over and above that, there are the Ontario hospitals which are run by the Ontario government, so the Ombudsman has jurisdiction there already.

I think down the road, assuming that we decide to take a close look at making recommendations with respect to expanded jurisdiction, the kind of thing that would be helpful and what I would like to request from someone like yourselves is—we will be at this task for a number of months—if instead of having two or three examples like the ones quoted in your brief, you could give people like myself on the committee 25 situations—no names or anything obviously—where individuals in the system had run into a problem with the present bureaucracy and did not get their needs satisfied and in fact were unjustly treated, as were enumerated in the two or three cases in your brief here today.

I would make that an official request if you have time to do this. I think because of the nature of your organization you may be in a better position to do this kind of thing than some of the other people. For example, we had an individual couple come in and present their case very graphically to us. That kind of thing is very meaningful when you are arguing with the bureaucrats who feel the the bureaucracy is satisfying the need completely. Statistically maybe it does in 98 per cent of the cases, but what we are addressing here is the two per cent that maybe are not being satisfied. Those are the ones in which the Ombudsman might be giving us some assistance. If you would do that for me personally and maybe the committee, if the committee sees fit, I would be very grateful.

Ms. Green: Yes, sir, we were deliberately brief in the cases that we presented because we felt that it was rather superfluous to keep on going, to keep on burdening you with further cases which signified the same intention.

Mr. Elliot: The reason I asked the question is that my background is education. You often get parents complaining at parent/teacher nights and staff tend to say, "We have a great school here and it is just wonderful," and all that kind of thing. When you can hand them 25 cases in that school that have gone off the rails in some way, shape or form from an individual student point of view, it is very graphic and really meaningful for a conscientious staff.

I think it is the same kind of situation here. Our role as a committee, because of the way we go at it, is to address those cases that cannot be resolved by the Ombudsman. It is on a case-by-case basis and there is an individual involved in the thing and we tend all of the time when we are dealing with bureaucracy to think it is a pretty good hospital and it is running great, but there might be an individual in there for whom it is not so great, and I think that is our concern. That would be very helpful to me, if you could see your way clear in doing it.

Mrs. Fraser: What time frame are you looking at, Mr. Elliot?

Mr. Elliot: I do not imagine we will be in a position to report before the end of the year as a committee or make recommendations, so it could be probably three to four months.

Mrs. Fraser: Okay, under that time frame, I think that would give us the opportunity to poll the rest of our membership. As I said when I was responding to Mr. Philip's question, often it takes the opportunity to ask, "Has there ever been a time?" and then you will get a response. We would have to do a formal survey and ask individuals, and I am sure we would be able to come up with situations.

Mr. Elliot: Thank you very much.

Mr. Pollock: By your name, social action committee, and by your brief, it sounds as though you people just go to bat for psychiatric patients. Is that a fact?

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Mrs. Fraser: Well, Mr. Pollock, because of the nature of our program, which is a community mental health program, it is run democratically and to do that there need to be committees. One of our committees is the social action committee and in the past it has looked at issues such as

nuclear war, etc., etc., pollution. In the past—I would say we are going on to two years—we decided to focus our energies particularly on mental health issues. So we made briefs and deputations to the Social Assistance Review Committee, Father Sean O'Sullivan's report, You've Got a Friend. We look for any opportunity we can to raise the interests of our members.

Mr. Pollock: But by your name I take it that the general public might see that name and might come to you not just with psychiatric problems but with physical problems.

Mrs. Fraser: Oh, you mean in terms of Friends and Advocates?

Mr. Pollock: Yeah.

Mrs. Fraser: Yes, we do get inquiries by individuals, and if it is an inquiry in terms of a physical disability or something of a legal nature, we do a lot of referrals to the Advocacy Resource Centre for the Handicapped, which does a lot of advocating for people. Does that answer your question?

Mr. Pollock: Yes, basically we are on the right track I think. But do you find a lot of cases coming there, say, where people are dissatisfied with the local hospital administrator and think they did not get a fair deal, along that line?

Mrs. Fraser: I would not say everyone feels that way, but there certainly is a percentage of individuals. No one wants to be in the psychiatric ward of a hospital whether it is general or provincial. It is not the nicest place to be. Some people find that it has been helpful for them and their stay in the hospital has helped them overcome some of the problems. Other people have felt that it was not helpful and it was not an experience that helped them overcome any problems, but more intensified the difficulties that they had. I am giving you a general answer. I do not think there is an absolute yes or an absolute no, but there is certainly a split.

Ms. Green: Mr. Pollock, in answer to your question, as chairperson of social action, I would like to make a comment, or two comments actually. Social action takes its direction from the members of the committee. As chairperson, I only speak for whatever is brought by the members of the committee; I cannot speak on my own. But about two years ago there was tremendous interest in looking into nursing homes, for example, although that perhaps does not come exclusively under the mandate of Friends and Advocates Etobicoke because we were concerned with other disadvantaged people as well. We became very interested in the fate of people in nursing homes. So that is addressing the first question.

As a patient, or former patient I had better say, an ex-psychiatric patient myself, there is—I do not like to indicate that there may be disunity here, but I personally would dissent from the view that was just expressed that no one wants to be in a psychiatric ward. I think there is a time when some of us want to be there because we feel there is a need for us to be there. I do not think that we want to give anybody the idea that we are all locked under bars and struggling frantically to escape. There are those of us who realize that there are times in our lives when that place is perhaps the safest place for us to be and perhaps some of us want to be there. So I would dissent from that comment.

Mr. Pollock: Have you any advice on how to get a nursing home in a certain area? I am very interested in that.

Ms. Green: Actually we are not the experts on nursing homes. We just became involved in it because we felt that this was another disadvantaged group and we should not limit ourselves to simply looking at psychiatric patients because we should look at others who were in similar predicaments as well.

Mr. Pollock: Coming from a large rural area, there are certain areas in my riding that do not get covered by nursing homes and therefore there is a major concern there because they do not want to have to move to another area. That is a major concern of mine too.

Madam Chairman: Any further questions from the committee? I see none. I just would like to thank you for coming today. You have been very helpful in our deliberations and if you do compile a list of cases, you can just forward it to our clerk and I think everybody would be interested in it. When you do that I think it would be most helpful.

Is there anything further from the committee at this time? If not, we will adjourn and reconvene tomorrow morning at ten o'clock. Thank you.

The committee adjourned at 2:45 p.m.

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STANDING COMMITTEE ON THE OMBUDSMAN
EXPANSION OF OMBUDSMAN'S JURISDICTION
THURSDAY, AUGUST 25, 1988
Morning Sitting



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Elliot, R. Walter (Halton North L)
Bossy, Maurice L. (Chatham-Kent L)
Bryden, Marion (Beaches-Woodbine NDP)
Carrothers, Douglas A. (Oakville South L)
Henderson, D. James (Etobicoke-Humber L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
Mackenzie, Bob (Hamilton East NDP)
McLean, Allan K. (Simcoe East PC)
Pollock, Jim (Hastings-Peterborough PC)

Substitutions:

McClelland, Carman (Brampton North L) for Mr. MacDonald
Philip, Ed (Etobicoke-Rexdale NDP) for Mr. Mackenzie
Villeneuve, Noble (Stormont, Dundas and Glengarry PC) for Mr. McLean

Also taking part:

Bryden, Marion (Beaches-Woodbine NDP)

Clerk: Carrozza, Franco

Staff:

Wilson, Jennifer, Research Officer, Legislative Research Service

Witnesses:

From the Ontario Home Builders' Association:

Heron, Hugh, President
DiIorio, Alido, First Vice-President

From the Office of the Ombudsman:

Zacks, Michael, General Counsel

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Thursday, August 25, 1988

The committee met at 10:10 a.m. in committee room 1.

EXPANSION OF OMBUDSMAN'S JURISDICTION
(continued)

Madam Chairman: I call this meeting to order. Does the committee have anything to discuss before we commence? Seeing nothing of interest coming forward, we have before us this morning on the expanded jurisdiction of the Ombudsman the Ontario Home Builders' Association: the president, Hugh Heron, Alido DiIorio, the first vice-president, and Bryan Kozman, who is on staff with the association. We have a brief before us. If you would like to make your presentation, I am sure we will then have some questions from the committee at that time.

Mr. Philip: I always thought Hugh Heron was an actor who put on an accent, but I gather he is really here.

Mr. Heron: Thank you very much. That makes me feel at home.

ONTARIO HOME BUILDERS' ASSOCIATION

Mr. Heron: As Mr. Philip has said, I am Hugh Heron. On my right-hand side is Alido DiIorio and on my left is Bryan Kozman, who is the director of policy research for the Ontario Home Builders' Association.

The Ontario Home Builders' Association is a voluntary organization of members involved in the residential construction industry across Ontario. Our 3,200 member companies represent various disciplines including builders, land developers, renovators, trade contractors such as plumbers, electricians and bricklayers, realtors, mortgage lenders, manufacturers, suppliers, planners, architects and engineers.

The Ontario Home Builders' Association facilitates the exchange of ideas and information and keeps members current and informed. Most important, our association represents the interests of the home building industry in Ontario. But it is more than just an industry organization. The association is also of benefit to the public.

We provide ongoing training and technical assistance to our members, which ensure that Ontario home buyers continue to have available to them some of the best-built housing in the world. We develop professionalism in the industry and enforce a code of ethics which results in the public being dealt with fairly and honestly by our members. Through our 28 local associations, we are a valuable resource supplying information on member companies. We furnish helpful guidelines on how to buy a home, renovate or hire a tradesman. We do this because we believe an educated consumer is the best consumer.

We believe strongly in home ownership as a way of life. Buying a home gives Canadians a stake in their community. It provides the average Canadian with an opportunity to develop equity. A home is a place for families and engenders strong ties within our society. In essence, we regard home ownership

as an essential part of the Canadian dream and are doing everything possible to help every Ontarian realize it.

The Ontario Home Builders' Association is also proud of its role in Ontario's building industry, the single largest employer in the province. Directly and indirectly, we employ nearly 400,000 people, twice as many as the agricultural sector and three times as many as the auto industry. The impact we have on the provincial economy is more widespread than any other industry's. Our business is building the infrastructure for today's changing and expanding society, whether that be single-family homes, condominiums or apartments.

During the past three years, the home building industry has been witnessing some of the most feverish activity in over a decade. Activity has been fuelled by pent-up demand resulting from the 1982 recession, the lowest unemployment rates in the country, significant population growth through both net migration from other provinces and immigration from abroad, strong economic growth in the manufacturing and service sectors and an unprecedented level of consumer confidence. You will notice I have dropped the comment about attractive mortgage rates because of what is going on at the moment.

In 1985, there were 64,871 housing starts in Ontario, a 35 per cent increase over the previous year; 1986 saw a further 26 per cent increase in starts, and for 1987, the 105,213 starts meant another rise of 29 per cent. Our industry is a driving force in the province's currently thriving economy. Last year residential investment expenditures reached \$17.9 billion. In 1988, we will contribute in excess of \$20 billion to the Ontario economy.

We contribute significantly to Ontario's economic strength, yet, as individuals, the majority of home builders are small businessmen. More than two thirds of the home builders construct less than five houses per year. Our impact on the economy, employment and quality of life in the province cannot be overemphasized. We believe that our success and prosperity is critical to Ontario's prosperity.

Like so many other business sectors, the home building industry has been forced to respond to an unpredictable business cycle. The economic growth that Ontario is now experiencing has certainly contributed to our present levels of activity. The tremendous pace of the past three years has had our industry working beyond maximum capacity. As a result, we are dealing with a scarcity of skilled trades, building material shortages, delayed closings and an after-sales service dilemma.

Given the extensive demands placed on the home building industry during the current housing boom, we believe our members have reacted with remarkable vigour. We exist to serve the marketplace and we have proved that we have the capacity to respond quickly to meet market demands. Our association has also responded to these problems.

In 1987, we took part in the government's major legislative review project that examined the laws which regulate the interactions between our industry and consumers. OHBA participated in reviews of the Condominium Act, the Ontario New Home Warranties Plan Act and the Real Estate and Business Brokers Act.

We believe that our members have responded to industry challenges in a responsible and honest manner. As an association, we have taken a strong stand on professionalism and have discontinued the membership of builders who have

not adhered to our code of ethics. We will continue to regulate ourselves and to place high value on membership in the home builders' association.

The Ontario Home Builders' Association believes that close co-operation and dialogue with the government can resolve those problems in the housing area which have become a major societal dilemma. By outlining our concerns, communicating our problems and putting forward viable solutions we can become a key element in facilitating a long-term resolution to our housing needs.

Mr. DiIorio: In his opening remarks on expanding the jurisdiction of the Ombudsman, Dr. Daniel Hill quotes the Chief Justice of Canada as saying:

"Government now provides services and benefits, intervenes actively in the marketplace and engages in proprietary functions that 50 years ago would have been unthinkable. As a side effect of these changes, and the profusion of boards, agencies and public corporations necessary to achieve them, has come the increased exposure to maladministration, abuse of authority and official insensitivity. And the growth of a distant, impersonal, professionalized structure of government has tended to dehumanize interaction between citizens and those who serve them."

The Ontario Home Builders' Association agrees that this viewpoint may characterize the situation in some governmental and public organizations. As such, there may be a need for an agency such as the Ombudsman to step in as a right or avenue of appeal. However, we do not believe that this characterization typifies the operation of the Ontario New Home Warranty Program.

The standing committee would likely find it difficult to identify another consumer protection organization or advocate which so effectively brings together the two parties to a dispute in order that a satisfactory agreement be reached. The Ontario New Home Warranty Program takes seriously its role as an arbitrator and conciliator in this dispute resolution mechanism. The program has fostered a community approach to decision-making. Having both the vendor/builder and the consumer involved in discussions ensures that the important human aspect is never lost.

Dr. Hill, again in his position paper, states, "Many people either do not understand or find it unacceptable that the Ombudsman, the last resort, cannot help them." While that may be true in instances concerning agencies such as universities and public hospitals or issues such as general welfare assistance, there is an appeals process in place for new home buyers through the Commercial Registration Appeal Tribunal. Both the purchaser and the builder are entitled to a hearing before the tribunal if they feel dissatisfied or disagree with the decision made by the Ontario New Home Warranty Program.

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In fact, the Ontario New Home Warranty Program has also initiated an internal committee of its own to review cases when initial decisions are appealed to the tribunal. The aim of this process has been to ensure that the Ontario New Home Warranty Program position was reasonable. This has served as an effective system of checks and balances permitting the re-evaluation of areas under the program jurisdiction that require refinement.

The Ontario New Home Warranty Program has functioned quite well in resolving disputes between buyers and sellers. We note with interest that the

Ombudsman recognizes this in his position paper. Dr. Hill states, "If the number of complaints I have received about the plan is reflective of the performance of the plan, it is indeed working well because my office receives very few complaints; perhaps on the order of one or two per year." As acknowledged by Dr. Hill, the program works remarkably well. He further acknowledges that his desire for jurisdiction over the program does not reflect the same sense of urgency as do his concerns over public hospitals and children's aid societies.

The Ombudsman states that individuals make the biggest commitment of their lives in the purchase of a home. It involves a significant outlay of financial resources, the consummation of a great effort in searching for the right place and, in effect, it can be the realization of a lifetime dream. The builders of Ontario recognized this in 1976 when they established the province's first voluntary home warranty program. It was and still is our belief that consumer protection was a necessary part of the continued health and growth of our industry. Once initiated by the Ontario Home Builders' Association the program became mandatory with the passage of provincial legislation on December 31, 1976.

The Ontario New Home Warranty Program is totally self-funding with no financial outlays by taxpayers or government. We believe this is a critical point which needs to be taken into account in your consideration. There is no public taxpayer money in the program. It is the only mandatory program in Canada and only one of three mandatory programs in the world. It is recognized by many as the most successful home warranty program, being the second largest in terms of home buyers covered and comprehensiveness of warranty.

Since its inception, the Ontario New Home Warranty Program has been an evolutionary type of program, changing to accommodate the needs of an ever-changing marketplace. The program has never regressed in carrying out its mandate of consumer protection. Indeed, since the writing of Dr. Hill's position paper in September 1986, numerous positive changes have been developed and initiated. These enhancements have all been aimed at increasing the degree of consumer protection for home buyers.

In order to alleviate some of the problems associated with delayed closing, an addendum to agreements of purchase and sale was implemented in February 1987. The addendum improved standards of disclosure and highlighted specific issues which purchasers should examine carefully when entering into contracts.

Changes in April 1987 focused on increasing warranty coverage for new homes from \$20,000 to \$50,000. This coverage protects home owners from major structural defects such as the failure of a load-bearing partition, major cracks in basement walls and the collapse of joists or roof structure. The changes also extended basement warranties from one to two years and provided compensation to home owners for incomplete work.

In June 1987, the Ontario New Home Warranty Program introduced a mandatory inspection program for all new builders registering with the program, to ensure that a better quality product was being delivered. In conjunction with our association, the program has also offered extensive training and education opportunities for builders in Ontario.

This past June also saw the initiative of significant consumer protection measures aimed at addressing late closings and substitutions. Unless adequate notice is given regarding extension of closing dates, a

purchaser is now entitled to compensation from the builder. Builders will also be required to obtain consent from buyers regarding substitutions involving key elements of their homes. Damages can now be claimed unless proper notice is given.

With input from industry, public and government, enhancements have been continually developed and implemented. The Ontario New Home Warranty Program will continue to serve the needs of the individual purchaser, since that is its primary focus.

Mr. Heron: The Ontario Home Builders' Association believes that the Ontario New Home Warranty Program has functioned extremely well in serving the new home buyers of Ontario. We do not believe it is necessary to include the Ontario New Home Warranty Program within the watchdog mandate of the Ombudsman. If purchasers are not satisfied with decisions reached by the Ontario New Home Warranty Program, there are mechanisms in place such as the Commercial Registration Appeal Tribunal to serve as additional recourse.

It should also be emphasized that the warranty program operates and carries out its mandate with no financing from the taxpayer. The Ontario New Home Warranty Program is not broken in terms of its responsibility to enhance consumer protection, and we do not believe it needs to be fixed by placing it under the Ombudsman's jurisdiction. People do not fall through the cracks and are dealt with honestly, fairly and directly.

The Ontario Home Builders' Association would like to thank the standing committee for the opportunity to take part in these important discussions. We trust our comments will be useful in the committee's deliberations, and Madam Chairman, we would welcome any questions coming from yourself or your committee.

Mr. Philip: I believe there was a comment made by Mr. DiIorio, but either Mr. Heron or Mr. DiIorio may wish to address this, that there is no public money in this program. Would you agree that under the new warranty program, unlike the original program that was set up as the Housing and Urban Development Association of Canada home warranty program, it is a compulsory program, and therefore there is no person purchasing a home who is not indirectly, in some way paying for this program? It is a completely compulsory program. You cannot buy a new house in Ontario where you are not paying the cost of the program out of your pocket, through the builder's sales price.

Mr. DiIorio: It is a mandatory program and there is a fee for registration if you buy the home outright from a registered builder vendor. However, if you were to build your own home, the home does not have to be registered.

Mr. Philip: No, if you act as your own subcontractor, then you are responsible to yourself.

Mr. Heron: I think you are absolutely correct, Mr. Philip. It is a cost of building the home, the fee for the Ontario New Home Warranty Program, and is thus paid by the home consumer. I think we are still correct in saying it is not borne by the general taxpayer, but it is borne by someone who wants to buy a new home at this point, yes.

Mr. DiIorio: It is similar to an insurance program. Basically, that is what it is.

Mr. Philip: Why should this be any different from any other compulsory program that is covered by appeal to the Ombudsman at the moment? Why should you be any different? It is a compulsory program. It is not an optional program. I am going to pay a fee indirectly through my builder if I wish to purchase a new home. Why should you be exempt compared to any other program that is a compulsory program and that I might have recourse to the Ombudsman about if I get treated arbitrarily?

Mr. Heron: I guess the feeling we have is that it is not broken at the moment. It seems to be working. We suggest the correct program is in place at the moment. It is not broken at the moment. It is working and we do not think he needs to be involved. If you take Dr. Hill's comments, he has only had one or two comments, albeit that statement came before the latest round of late closings and substitutions, that type of thing. Again, we suggest to you that the last couple of years may or may not be repeated; the industry has reacted to it. The program seems to be working at the moment, and if it is fixed, why break it down? Why change it?

Mr. Philip: I guess my experience has been mainly a few years ago when they had a large amount of land that could be built on in my riding. Since that time, I have not had as much contact with the program, but I can tell you that a few years ago I considered it broken. I gather from listening to one of the Liberal members on the radio this morning, talking about the qualifications of inspectors, that she seems to think the program is not being very effective.

Mr. DiIorio: If we go back to the position the program was in a couple of years ago, I think as an industry we went through some unprecedented times. There were all sorts of problems within the industry. The warranty program and the industry had never faced —

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Mr. Lupusella: Madam Chairperson, I am sorry to interrupt. It appears this committee is impartial and no politics is involved in an issue before this committee. I recommend the member withdraw his statement.

Madam Chairman: Any comment on Mr. Lupusella's point of order, Mr. Philip?

Mr. Philip: Her name slipped my memory—

Mr. Lupusella: Withdraw and be quiet. You want to be—

Mr. Philip: I am sorry. Am I responding or am I once again going to be interrupted by the scarecrow from the Wizard of Oz? I merely used the word "Liberal" because the person's name slipped my memory.

Mr. Villeneuve: Barbara Sullivan.

Mr. Philip: Barbara Sullivan. I apologize and I remove the word "Liberal" if it offends you. I guess sometimes people who cannot decide which party they are in object to party names.

Madam Chairman: Mr. Philip, I think we have resolved that point of order and I thank you for bringing that to my attention, Mr. Lupusella.

Mr. Philip: I wonder if you can answer some of the problems Mrs.

Sullivan was bringing up this morning. She seems to think there are no set qualifications for inspectors, and that therefore there is no quality control on that.

Mr. DiIorio: Inspectors in the warranty program or inspectors in municipalities?

Mr. Philip: I think she was talking about both, although it was not clear from the interview.

Mr. DiIorio: With my experience with municipal inspectors in Mrs. Sullivan's riding, I do not find that to be an accurate reflection of the situation. Inspectors in that particular area in most municipalities are certified engineering technicians in most cases. They apply the standards set out in the Ontario Building Code, which is one of the most stringent codes in the world when it comes to residential construction. The inspectors of the warranty program are people with a vast deal of experience. I am sure that when the warranty program appears this afternoon, it will be able to give you more information on their qualifications.

There is a vast amount of experience. In my experience with the program in conciliations, if there were to be a slant, it would be towards resolution of the problem with respect to the wishes of the consumer. As in any program, there are situations where there could be some dissatisfaction with the results or the outcome of a conciliation, and then we have the tribunal set up that takes care of that.

To answer the previous question or statement you made with respect to the problems the industry had in the warranty program and the attack the warranty program came under a couple of years ago, the past two years have shown the warranty program's resolve in dealing with those issues in a very positive manner. Therefore, all the enhancements to the program, the stronger or more rigid adherence to registration qualifications, the speeding up of conciliations, and all the other regulations that came down at the beginning of June this year basically will now provide a great deal more protection to the consumer through improved disclosure, improved communication and accountability of the builder to respond properly to his contractual obligations. The warranty program now has the power to come in and make good on that contract.

Mr. Philip: But you have indicated that there are no set qualifications for inspectors under the warranty program. I can say that somebody has experience.

Mr. DiIorio: I did not state that. I stated the warranty program could better answer that particular question for you because I do not know what its requirements are; not that there are no requirements.

Mr. Philip: You stated that there is always recourse to the tribunal. My experience with the tribunal is that it is very legalistic and that one had better not show up at the tribunal without legal counsel. I am sure that if your own company has not been personally involved in a dispute at the tribunal, you have at least sat in at the tribunal at some time.

Would you not agree that it is a very formal system, certainly with a litigation lawyer on the side of the warranty program, to examine and cross-examine the complainant and his or her witnesses, if he or she has any,

and that it is much more formal and much more legalistic than most tribunals in this province?

Mr. DiIorio: I have never been to Commercial Registration Appeal Tribunal hearings, so I have no experience of how it would be, but I would gather that, basically, your frame of reference would be correct. However, before it gets to CRAT, there is a conciliation which is very informal, with no legal representation. There is a further unwritten regulation that you can have a re-conciliation or a reinspection of the situation.

My experience has been that the percentage of conciliations with respect to registrations is rather low in this province, and the actual outcome, the cases that go to CRAT hearings is a very small percentage. In that particular case, there usually tend to be some very serious issues at stake and it would require a more organized or a more rigidly structured hearing. So there is nothing wrong with that process. Basically, the program was intended in its original concept to eliminate or reduce the number of instances where the only recourse a consumer had would be through the court system. It has served that purpose well. There is the mediation process involved and it seems to work well. My experience is that it works extremely well.

Mr. Philip: I have been at the tribunal and I can tell you that I would rather appear in the Supreme Court. It is less formal and more flexible than the tribunal.

Mr. DiIorio: You still have that option.

Mr. Philip: Yes, I know; at considerable cost and the whole purpose of tribunals is to try to eliminate cost. I suggest that this tribunal in fact is no different from a court system. You simply go with legal counsel or you are not going to get anywhere.

I am going to ask this of Barry Rose when he comes later, so he might have it as a notice of a question, I guess. People who have worked for the program and personal friends who are builders feel that the warranty program is much more bureaucratic and much more top-heavy than any government agency they have ever seen. I would like to know, if it is an insurance program as you say, what is the cost of the overhead as a percentage of what is paid out? Also, how many legal counsel and how many administrators do they have as compared to conciliators, namely, the inspectors who are out there on the front line trying to solve problems as early as possible?

I do not know, Mr. Heron, whether you have an answer to that, but this is out of your pocket as a builder, or out of your consumer's pocket, and I am sure you must be concerned about this.

Mr. Heron: I am always concerned about dealing with any bureaucracy or anyone having jurisdiction in our industry. But I can tell you this, Mr. Philip: my involvement with the program has been such that when they send me a letter, it puts the fear of God in me. I look at that and I realize I have got a letter of complaint coming through a body that can register my business and that can take that registration away, so I work very quickly at overcoming my problems with the Ontario New Home Warranty Program.

At the moment, I can tell you that from information I have, I have no conciliations against our company and I do not see evidence of top-heaviness down there. I see evidence of people working hard within an organization with an environment that certainly has changed over the last two years. As far as

the makeup, legal counsel and the suggestion it is top-heavy are concerned, I think you really have to leave that to Barry this afternoon, but I have not seen any evidence of that down at the program. I am a big supporter of the program.

Mr. Philip: I have a friend who is not part of the two thirds who construct fewer than five houses a year and he has not had one case before the home warranty program. He feels he is paying out for all the bad apples in the business and feels there are not enough licences removed, or that they appear in a different form under their uncle's name or their brother's name. Is it not a problem in your business that somebody like yourself, who has a good reputation, actually ends up paying for the guys who are—in my riding, I had one guy who changed the name of his company every four houses and all of his subcontractors every four houses, and yet he managed to operate under the program.

Mr. Heron: I guess if you went back to 1976, that may well have been a criticism of some of the people sitting down to form the association. It is easy to say, "I am a good builder, your friend is a good builder and Alido is a good builder and we can all go on our merry way," but we also run into problems, because we use the same pool of labour, materials and so forth.

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Again, I would get back to you and say that I think the program is doing well. The program has made mistakes. I think this afternoon you will hear that from Mr. Assaly and from Barry Rose. Everybody makes mistakes, but there are the actions that have taken place in the last couple of years, when some errors were really highlighted such as the ones Alido DiIorio referred to, namely, ensuring the consumer knows exactly where his house is in the process, and right on front there, with their notice of sale date written by the Ontario New Home Warranty Program, is the comment that we have to take your offer to purchase to a lawyer. These have all been steps in the right direction.

The other thing your friend would suggest, and openly and honestly, is that there are some great training programs coming out of the Ontario New Home Warranty Program. I certainly get copies of the videos and talk about truss uplift and so forth. It may be top-heavy if you think everybody down there is just doing inspections, but there are other things going on down at the Ontario New Home Warranty Program. Again, as I say, I am a brand-new member of the board. I am pretty close to it and I think they are doing a fine job. That is why we are here today supporting them and suggesting that things are going along quite well.

Mr. Philip: One last question, then: you are registered; subcontractors are not. You just mentioned there could be problems, then, that you have subcontractors coming and going with your—

Mr. Heron: The point I am making is—

Mr. Philip: Should they be registered as well?

Mr. Heron: Again, at the moment it seems to be working quite well. There is a suggestion some people have made that subcontractors and suppliers should in fact be registered. It is something the program will look at, and there have been suggestions to the program that this may in fact take place.

But that is part and parcel of the ongoing examination of a program that, in my opinion, is run very well.

Mr. Philip: Thank you.

Ms. Bryden: I too have had quite a few complaints from constituents who feel they did not get satisfaction from the Ontario New Home Warranty Program, but some of that will come up this afternoon. But the complaint on the radio this morning, I think, was that the Ministry of Consumer and Commercial Relations should have a separate registration for building standard inspectors or for people who are construction inspectors in connection with house-building activities.

Would you favour a separate registration system for such inspectors? I presume you use them as well in your monitoring of the house builders in your program, particularly for the new home buyers. Would you favour a separate registration and a separate appeal tribunal for complaints against those inspectors? As my colleague the member for Etobicoke-Rexdale (Mr. Philip) has pointed out, the appeal tribunal deals with all kinds of commercial registration appeals, which means there is probably a long backlog of cases, as well as the overlegalistic approach.

You are dealing with an appeal tribunal that has no particular experience in the building industry. I think that in order for the consumers to get to the Ombudsman, if we suggested the extension there, they would have to go through such a long ritual of appeal, and then get a judgement and try to enforce it before they could go to the Ombudsman and say, "Look, we do not have the kind of remedy we wanted." Would you favour a separate appeal tribunal for building infractions so that it could get to the Ombudsman more quickly?

Mr. Heron: I am at a disadvantage because I was not party to the program this morning that we are talking about. Maybe if I just stepped into CRAT—my name has been put forward as a possible member of that tribunal, so I will certainly know a little bit about the building industry when complaints come forward.

When one talks about inspectors, was the program this morning talking about building inspectors, heating inspectors, drainage inspectors or inspectors from the Ontario New Home Warranty Program?

Ms. Bryden: I think it was both, some municipal and some from the home warranty program.

Mr. Heron: Certainly, in Scarborough where both you and the chairman come from, the standards of building inspectors are extremely high. I think it is fair to say about most of the larger cities throughout Ontario that the building inspectors' standards are high, and the examination of them. Alido DiIorio suggested that most of them are CETs, certified engineering technicians or technologists, as a minimum. Again, I am not in a position—maybe Alido is—to know the standards for building inspectors; they are pretty high. It has changed over the last number of years. There are a lot of young people, bright people coming into the industry. The amount of inspection, the quality of inspection, I think, has really come along very well in the last couple of years.

As far as whether they should be regulated or not is concerned, I know there is a concern among the building inspectors' community about something

called applicable law in the building codes. They are terrified of being sued as individuals rather than as a community. I am not familiar with it, but there may well be at the moment some means in the legislation of governing the ability of that building inspector. I suggest there is.

Ms. Bryden: Also, of course, we are dealing with the whole province. It may be that the larger centres have adequate standards for their inspectors, but right across the province they may have less qualified people because they are smaller. If you had standards, though, you could be sure that the person, wherever he is operating, would have certain qualifications before he took on this job.

Mr. Heron: We have never found that there is a relationship between quality and size. Some of the smaller builders we have are probably the best builders. In some of the smaller communities, with someone who does more than just building, maybe farming and on the side is a part-time inspector, the quality there is sometimes extremely high too, just to make a comment that, other than the large centres, you will find some of the smaller areas are pretty high too.

Ms. Bryden: You have not really said whether you think there should be a separate registration.

Mr. Heron: I am suggesting to you at the moment that there may well be something in the legislation that governs building inspectors. Not being a building inspector myself, I am making no comment.

Ms. Bryden: The Supreme Court of Ontario recently ruled that tenants in condominiums who have complaints about the quality of the property in which they are living are not eligible to claim compensation or assistance in remedying defects under the home warranty plan. Condos are covered when they are built for condos, but in a lot of cases condos are being built and then largely rented out, especially being built as investment properties. Those tenants, I gather from that court decision, do not have any access to the home warranty program in getting defects remedied. Do you intend to appeal that decision, which said that they should have access to the home warranty program?

Madam Chairman: May I interject for just a moment here? I am becoming a bit concerned. While I think we all have our personal views about the Ontario New Home Warranty Program—and I am saying this now because we do have these individuals coming in this afternoon on this specific point—I am concerned that we keep our discussion to the effectiveness of the program in terms of question of the expanded jurisdiction of the Ombudsman.

While all of us may want to know about separate appeal tribunal procedures for inspectors, and while I gather that this interview that was on the CBC this morning was quite interesting, I am getting a little concerned that it is not on the point. I have a growing list, and while I think you all want to satisfy your curiosity about the program, I am concerned that we will do so this afternoon and be here for ever.

I do want to caution you to keep in mind whether your question is really on the question that is at hand today, which is expanded jurisdiction of the Ombudsman, and not just curiosity about the program and the problems within it. I caution you that way.

Ms. Bryden, if you still think your question is on the point, I will certainly allow Mr. Heron to reply to it, but I am concerned that this is something that can be discussed after the committee breaks

Ms. Bryden: I guess the crux of my question is, is the home builders' association intending to appeal that decision, which will add to the costs of the home warranty program and costs that you have to charge to your consumers?

Mr. Heron: At the moment we are not intending to appeal that, although maybe the committee will, but we will continue—and I am sorry, this may be a little off topic—to fight a situation whereby builders in fact are doing what you are suggesting, and that is building condominiums they are renting out because of the problems that rent controls have created in this province. We think rent controls should be replaced. I may be out of order. The point is that is what is causing some of the suggestions you are talking about.

Ms. Bryden: Did you say rent controls should be replaced?

Mr. Heron: Yes. They should be replaced with service to the people who really need it—shelter allowances.

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Ms. Bryden: A lot of tenants would agree.

Mr. McClelland: I must say at the outset that most people who are familiar with the riding I represent will know that it is an extremely rapidly growing area. It has a population base of approximately 100,000. It is growing at 16 per cent to 18 per cent per year and most of those are new homes.

Having said that and also having had the experience of having been in a number of new homes myself in the past few years, I want to say at the outset that the number of initial complaints seems to be fairly significant. In other words, there are a lot of initial complaints that come in about everything from maybe door jambs being out of alignment to some of the potentially more serious structural defects or alleged structural defects.

My experience has been—and I want to talk to you about this—that the vast majority of those are satisfied very quickly by the builders. There are a few that are not. We intervene in those as necessary.

As a member of the association, what requirements do you put on builders for them to provide a mechanism for initial satisfaction on the site? By way of personal experience, when I move into a new home, I am given a sheet to list items that I need to have addressed in terms of the new home. Is that a requirement. What kinds of requirements might you have for membership? I would like you just to help us out with the process that you impose on your membership for resolution in the first instance.

Mr. Heron: The Ontario Home Builders' Association has a code of ethics that one has to adhere to. Over the past two years, there have been a number of home builders whose membership, particularly in the Toronto Home Builders' Association, has been revoked.

What we have attempted to do is that we as an association are trying to increase communication between our members and the consumers. We have suggested that what is typical in a situation is that someone buys a new home and goes through a predelivery inspection. Together with that is a certificate of completion coming out of the Ontario New Home Warranty Program in which they write down all the outstanding complaints within the house. Those

complaints are registered with the new home warranty program. The builder then, in accepting that complaint, is responsible for clearing up that complaint.

I go back to the past couple of years in which we had unprecedented demands on our industry, limited trades and so forth. One of the results of that has been late closings and after-sale service, because we just do not have the resources there.

The industry has been saying to its membership and through the new home warranty program as well that what we have to do is communicate with our consumers. I think our industry is now communicating with the consumers and otherwise accepting the responsibility that to fix up the houses is that of the industry, not of the consumer. The consumer does not have to put up with subquality work. The consumer should demand quality from the builder. It is our responsibility to clean them up and keep the consumer educated and aware. If we are coming on Tuesday morning, we should advise them we are coming on Tuesday morning.

Also, in our industry—I have done this since 1983, when I was president of the Toronto Home Builders' Association—we have repeatedly made the suggestion that people spend more time buying a pair of shoes than they do buying a house. We have said to people that what they have to do is check out whom they are buying from. We can have an association, but we require an educated consumer. If you have an educated consumer then a lot of the problems are put behind you.

We suggest that consumers should find out who the builder is. The consumer should ask where that builder has built previously. The consumer should then go knocking on the doors of that previous construction site and ask how the builder treated them. Bear in mind that the best time you see a builder is at the point of sale when the builder has a smile on his face and is trying to get you to sign on the dotted line.

The other thing we say to the consumer is that before he buys, he take his offer to purchase to a lawyer, and a lawyer who knows the real estate industry—not your brother-in-law who can give you a deal at \$200; go out there and get some decent legal advice from someone within the industry.

We are constantly upgrading training and so forth within the industry. We have admitted in our brief that we have had problems over the past couple of years. But one of the things we are doing is trying to ensure that our membership communicates with that consumer and makes that consumer aware of what his rights are, because we truly believe that an educated consumer will take complaints away from the new home warranty program and there certainly would not be any need for an Ombudsman.

Mr. McClelland: My experience, as a follow-up to that, has been that in addition to the predelivery, their preclosing inspection and so forth, a number of builders, certainly in the area I represent, come and add an additional, if you will, or gratuitous visit and provide a mechanism whereby the consumers can address complaints that may have come to light after they have been in for a while. I think that is laudable.

My second point was in terms of consumer education, and you touched on that; you led into that. How much money are you putting in as an association? I am not sure the dollars and cents is all that necessary, but is it a collective effort by the Ontario Home Builders' Association? Are all your .

members involved in the consumer education process? In other words, is it mandatory or is it optional participation in your efforts for the education of the consumer?

Mr. Heron: Consumer education, I think, is really dominated by the leadership of the association. It is all voluntary. Alido and I are sitting here today, and we are voluntary. The only paid member is Bryan. We do this by example and by comments on the radio, TV and so forth. Mr. Philip said there really is a Hugh Heron. I have spent an awful lot of time using the media to try to get across to the consumer that an educated consumer is really the one that matters.

Believe you me, when your name is on the door, as Heron Homes is, and you talk about quality and about servicing that customer, you have to make sure—in our shop, anyway—that you are on top of things. Some of our people get upset at me when I go out making these statements, because they are up to their neck in problems.

We have nothing to hide as an industry and as an association, and I would suggest that our industry has come an awful long way in the last number of years. It was not that long ago when our industry was hoping that we would get sales so as to put some food on the table. I remember in 1981-82 going home and wondering whether or not my key was going to fit in the door, whether the bank owned the house or whether I owned it.

We do live in a cyclical business, and that cyclical business has given us some problems over the last number of years—some good problems, as we have indicated, in their contribution to the province of Ontario, but also problems for the industry, being late closings and after-sale service.

We think we are working through the problem. That problem is going to be driven and done away with by consumer education. We will have some bad apples. We admit we have bad apples, and we have thrown some people out of the association. We try to be open and up front and admit our mistakes when we can.

Mr. McClelland: A last question. Again you mentioned what I was going to lead into. You have a self-interest, obviously; you are in it to make a profit. We live, presumably and hopefully, in a free enterprise system, and you have your self-interest as a builder, as do your competitors.

What policing or what process of policing of your other membership is there in terms of the bad apples? First, what do you do to assist them and to assist the consumer who may be caught in that, if you do anything at that level? Second, what process do you have for removing people from your association and the effect that has on the consumer who would be buying from that builder?

Mr. DiIorio: We have 28 local associations across the province, we have eight provincial councils and we have the umbrella Canadian Home Builders' Association. We all subscribe to a code of ethics, which basically allows us to revoke the membership of people who do not treat their purchasers in a businesslike manner, honestly and fairly, or who do not treat their suppliers and subtrades in a similar manner.

Because it is a voluntary association, you usually find the committed players being members of our association. The ones who are the bad apples, as they have been referred to, usually are outside our association. Whenever one of them appears to be within our group, he is removed, and the name is

published among the association members. It does tend to cause other members to pull up their socks.

If a situation arises, it is usually your responsibility as a local president to pull that person aside and have a talk with him, along with the board of directors, and to assist him in cleaning up whatever problems he might have. In the last few years, it has been a common practice around the province to intervene in those instances, and in most cases to the betterment of the particular individual and how his customers are being treated.

We have an ongoing training process, at both the national association level and the provincial association level, which is delivered by the local associations. We have technical seminars in conjunction with the new home warranty program, Canada Mortgage and Housing Corp. and the National Research Council. At both the provincial and national levels, we have technical committees, and the people sitting on them have a great deal of experience in technical aspects of our association.

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We put on training seminars on issues. We developed new technology in home building through our R-2000 program and the Mark series of demonstration homes that we have been doing over the last 15 years, bringing this information to our members and upgrading their quality of construction.

We also have ongoing consumer relations programs at our various workshops and conferences both at the provincial and national levels. Some associations have conferences of their own at the local level. Our association is involved in the preparation and delivery of some of these programs.

We, as an industry, have matured significantly since the heydays of the 1960s and 1970s. We are catering to a very mature market, to a consumer who is very sophisticated and very demanding.

Our realization of consumer protection was demonstrated in the mid-1970s when we saw a need to bring forward some sort of warranty program which had to be based on consumer protection to basically restore confidence in the marketplace that by buying from a reputable builder, a buyer's deposit would be safeguarded, he would be treated in a fair manner, he would get delivery of a home that conformed to the Ontario Building Code and the particular builder he bought from would have to ensure that the house conformed to that particular set of standards.

It has been an ongoing thing. Membership revocation is a common practice these days. As Barry will tell you this afternoon, it is OHBA's position that the requirements for registration in the warranty program be strengthened or tightened; that new builders be monitored very, very closely and that people with adequate knowledge and experience are the ones who should be registered. That is probably the only way as an industry that we can police ourselves, and that has to be through the mandatory registration system.

Mr. Rose and his staff have taken that matter in hand and I think have made good strides over the last few years. We have seen the problems and now we are dealing with them. There is a new board and a new resolution on their behalf to come across with better and more focused consumer protection regulations for the consumer.

Mr. McClelland: I said that would be my last, and it was. This is just a bit of a supplementary. You could be very brief on this.

You talked about your involvement in developing the program in terms of consumer protection as well. Last year there were some announcements by the Ministry of Consumer and Commercial Relations, and you made reference to that on page 10. My understanding is that you were fairly significantly involved in the development of those new initiatives by the government, and I take it you continue to do that and work for that.

Mr. DiIorio: We continue to do that. In all fairness to everyone working with the warranty program, I think we played a very significant role in that. As an industry, we probably pushed the warranty program to come up with tighter regulations than what even the ministry wanted. It is an ongoing review process. We have made several suggestions to the ministry and to the warranty program, and we established standing committees to review problems and fine-tune the program.

There is a conscious effort on our part as an association and as an industry to have a warranty program that is consumer-oriented and basically to be adaptable to changing times. We are living in a society where our industry is continually changing on a day-to-day basis. We are moving from single-family into multiples, into high-rise, and at an increasing rate they are switching right back to low-rise, lower-density stuff wherever the market conditions dictate. That causes a lot of problems within our industry, with the warranty program. New problems are coming out of left field on an annual basis, and they have to be reviewed ahead of time in order to prevent the situation we had in June when we were really fixing problems that were created three years before.

The warranty program under Mr. Rose has come a long way. He is the new president and registrar of the program. He has brought some new ideas and a new focus on the program. At first, as an industry, we were very apprehensive of all these changes, and it goes back to Mr. Philip's friend, who was very concerned about the warranty program and related to the bureaucracy and so forth. Still, last year it had to register 100,000-odd units in this province. This year there will probably be another 80,000. These homes are insured over a five-year period of time for structural defects; they have a one-year warranty and a two-year basement warranty. There is a lot of administration involved and a lot of different issues that come up. A home is simply not what it used to be before. It is a much more technically intensive product and there are a lot of problems that come up.

The warranty program, in all honesty and all sincerity, is doing a remarkable job. At one time I was probably one of the most vocal critics of the program, but in the last couple of years I have come to appreciate its function and the determination to really serve the needs of the public. In doing so, my own personal interests are better protected, because it basically forces everyone to co-operate under the same rules and those rules are basically to protect the interests of the consumer.

Mr. Pollock: Let me compliment the Ontario Home Builders' Association on its brief and its explanation of the warranty program. As has already been mentioned, we have about the highest building code in any jurisdiction in the world here in Ontario, and of course, you have to get a building permit before you start to build and that building inspector is supposed to inspect that periodically.

Even with all that, though, there are a few people who seem to fall between the cracks and there are a few poor buildings getting built out there. Would you not think that in some of those cases that would be an argument for expanded jurisdiction for the Ombudsman?

For instance, if a person built his own home and he lived in it for a few months and then sold it, is that particular home covered under your warranty program?

Mr. Heron: I would suggest no. I do not think so. If it were built as his own residence, with him subcontracting? I would suggest no. Just two seconds. Barry? No?

Mr. Rose: No.

Mr. Heron: No.

Mr. Pollock: It would not be covered. In other words, it could be faulty and he could sell it and the new buyer would have no protection under your warranty program at all then.

Mr. Heron: No. But then again, remember what I said earlier, Mr. Pollock, if you follow the direction coming out of the home builders' association and you ask him where he has built previously before you buy from him and he says, "This is my own home, I am working at an automotive plant and I do this in my spare time, but I am really very good," and you do not look at it then, that is one of the problems.

Mr. DiIorio: If I could just add one thing, Mr. Pollock, as Mr. Heron said, there is an unpublicized function or procedure the warranty program undertakes. If this individual has a habit of building a home and living in it a couple of months and then selling it, they are out there with a team of three individuals who search out this type of people and prosecute them.

Mr. Pollock: If the house is faulty, of course.

Mr. DiIorio: To get it registered, they fall under the program. It is something that some people have tried to use as a means of not registering the home or basically taking advantage of the tax system in this country where you are not taxed on gains on the sale of your own personal residence. There is that function they carry out as well.

When something goes wrong with the house, the warranty program, on its inspection, will usually re-enter the premises with certified professional engineers and do an evaluation of that home. In the process, if there is conciliation and the builder fails—

Madam Chairman: I am sorry, but I think Mr. Pollock's point was on the particular instance of someone who would not end up getting registered within the program, and I think you answered that question.

Mr. Pollock: Maybe this is a question for some of the people from the Ombudsman's committee. Who covers senior citizens? They are basically built with funding from the Ministry of Housing.

Mr. Zacks: Do you mean senior citizens' homes?

Mr. Pollock: Yes; contractors.

Mr. Zacks: I do not know. They are built privately, I imagine. I do not believe they are constructed out of public funds. There may be some licensing provisions in place where an individual or corporation that wants to

operate as a home for senior citizens has to be licensed for that purpose and would build out of his own funds, but it would not be a situation analogous to an owned home, a single-family dwelling.

The dwelling we are talking about here would be more of an apartment type of structure where people would pay a fee to live in the home. There may even be public funding in some situations, but I do not believe the program has any role in that. I do not think there is any public system in place to ensure that construction problems are dealt with. I imagine the remedy for an individual who is dissatisfied with the accommodation would be to seek other accommodations, if he is able to. If not, if there is some sort of public financing aspect to it, if he is being assisted in that home, then maybe the remedy is to complain to the appropriate ministry.

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Mr. Heron: With those senior citizens, Mr. Pollock, the plans would be drawn up and submitted to a building department. They would be examined. There would be a building inspector in the building inspecting it as it goes through the process, if we are talking about senior citizens' buildings.

Mr. Pollock: Yes, but it would be my thought that the Ombudsman would have jurisdiction. Maybe there would be very few problems, but it is my understanding that all the funding comes from the Canada Mortgage and Housing Corp. and the Ministry of Housing.

Mr. Zacks: If there is a complaint involving the Ministry of Housing, then of course we have the jurisdiction to investigate that matter currently.

Mr. DiIorio: Those homes usually would not fall under the warranty program. They also fall under different sections of the building code. Then that is where the Professional Engineers Act and the Architects Act kick in with mandatory certification for occupancy. As relating to building standards, it is reviewed at a much more sophisticated level, let's say, than a single-family home.

Mr. Pollock: Because you would have to have a consulting engineer.

Mr. DiIorio: Yes, and also certified occupancy, detailing and so forth and as-built drawings and the matrix.

Mr. Pollock: Maybe this does not relate totally to expanded jurisdiction, but do you find that a lot of your problems result from the fact that the ground settles? You see literally hundreds of acres being scraped away and new fill being put in. There is no question about it originally. Then before too long they start building on that. It does not give that ground a chance to settle. Do you find a lot of your problems come from that particular action?

Mr. DiIorio: Settlement is a natural phenomenon in any type of construction. There is a whole engineering thing that we can go through, but basically once you remove soil, you tend to lift a load to build the building. It will never be as heavy as the earth that you removed. So you will always have a settlement and an uplifting situation. It is a natural occurrence. The type of construction and detailing allowed provides for those occurrences. If there is negligence and something occurs and the foundations are not installed properly, that is a different matter altogether.

Mr. Villeneuve: Thank you, gentlemen, for your presentation on behalf of the Ontario Home Builders' Association. I have never had occasion to deal with you people directly, but let's assume I am an unsatisfied, unhappy new home owner and quite obviously I have reached a standoff with my contractor so I do not know where to go. I see I am under the Ontario New Home Warranty Program. Could you draw me a scenario? I am one who does not believe in any more bureaucracy than is needed. Could you draw me a scenario on where I go and what happens to me, what happens to my contractor and to whom we speak?

Mr. DiIorio: Say that you move into a home and the builder fails to live up to his obligations. You send a registered letter to the builder and a copy to the warranty program. The warranty program will receive that particular letter and will then send a copy of that letter with a covering letter to the builder telling him he has 15 days in which to respond to those particular items, and an additional letter to the home owner stating that if he does not hear in 15 days to let the warranty program know.

With that, they also send him a "request for conciliation" form, which he would fill out if he did not get satisfaction. He sends that with a \$50 deposit to the warranty program. The warranty program will initiate a conciliation and bring the parties together.

The inspector will go through the home, review all the complaints of the home owner and decide which ones are legitimate complaints and which ones are not. He will then send the report of the conciliation to the builder and a copy to the home owner.

The builder has a stated period of time under which to carry out those particular remedies or give just cause why he cannot do it within that time frame. If he fails to respond or fails to carry out those particular remedies and the customer is not satisfied with the warranty program, we will arrange to intervene in sending in contractors to carry out the work.

At that particular point, after the work is done, the builder can go to the Commercial Registration Appeals Tribunal and seek remedy against the warranty program for intervening incorrectly, but the home owner's complaints have been rectified. The problem then comes between the builder and the warranty program. If the home owner is not satisfied with the results of the conciliation, we can take it further to the Commercial Registration Appeal Tribunal and then the warranty program and the builder have to defend their positions.

Mr. Villeneuve: Are we talking a time frame of six months possibly?

Mr. DiIorio: Probably around that. Under today's conditions, because it is not a perfect system, we are probably looking in that neighbourhood.

Mr. Heron: Bearing in mind that the builder is dealing with somebody who can take his licence away, he has a lot of respect for the new home warranty program.

Mr. DiIorio: There are too many of those situations. Barry now has the power to pull that licence. Without that licence, you cannot sell a home. You cannot even get a building permit, I would say, in 95 per cent of all municipalities unless you have a registration number.

Mr. Villeneuve: So that is pretty important, in spite of some of the loopholes that I am sure exist where you can wind up as someone else with

basically the same principals. Of course, that is something we cannot deal with here. It is something that we have to deal with in law.

Mr. DiIorio: Barry will probably be able to address that. I think he has expanded regulations now, and they are basically going behind the corporate name to the individuals. If the wife shows up for someone who had his licence pulled, I do not think they would be registered.

Mr. Villeneuve: Following up on that do you feel, based on your submission this morning, that you have satisfied 98-99 per cent of the complaints—maybe I should ask you at this stage of the game, six months later you have gone through all of the requirements, the hoops and barriers of going to the Ontario New Home Warranty Program, how many unhappy people do we still have?

Mr. Heron: As I said in our brief, according to Dr. Hill we are talking about one or two per year. One of the things is, if you put more legislation in it certainly will not get you any more bricklayers or builders or whatever. Part of the problem we have with the time lag is that we have a situation whereby we do not have enough people to build houses at the moment because of the marketplace; one has to accept that. At the moment I think the program is working extremely well.

An example of that was that the program was going to come out with some rating system and so forth and the industry was really very excited about it because it really meant their livelihood. They are very close to this program. Although the program has industry members and was developed by the industry, is a different body that is out there than maybe builders have, because it is a different body with different hats. They are the policemen of the industry. It may be uncommon these days to respect policemen but, as an industry we respect policemen and also the new home warranty program.

Mr. Villeneuve: That is interesting. There may be a dispute as to the number here, and I think my colleague Mr. Philip may have a supplementary on this very question.

Mr. Philip: My supplementary is simply that you mentioned twice what Dr. Hill—

Mr. Bossy: I think we have a—

Mr. Philip: I had a supplementary.

Madam Chairman: I think you indeed have had a a great deal of time. I would like to go to people who have not asked any questions, if you could hold your supplementary and consider the time.

Mr. Philip: I was just invited by Mr. Villeneuve to ask a supplementary on his question.

Madam Chairman: Mr. Villeneuve is not the chairman.

Mr. Villeneuve: One final question unrelated to what we have just been speaking about. In our area we have a large market for prefabricated homes. Do you cover them as well?

Mr. Heron: Yes, we could cover them. I think there are some builders and, again I would like to leave that until this afternoon for Barry Rose to talk about.

Mr. Villeneuve: Okay, because in the riding that I represent we have many who come in from Quebec, and it creates a problem. I guess you are not the people to address.

Mr. Elliot: I would like to focus on a couple of things, and a concern I have really from the expanded jurisdiction question. I would like to really focus on that aspect of this, because in most of the questioning this morning I do not think we have been talking about the expanded jurisdiction as far as the Ombudsman's office is concerned.

I have had some experience. I am from Halton North and most of the building that goes on up there now is in the classification of under five homes per year, but there are a few that go up to 20, 30, 40 sort of thing at this point in time. Probably the construction that will be going on in that area in the near future will be by fairly large developers building a lot of homes.

I have found in my experience with the program it is excellent, as you have said, and my concern is twofold.

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One is that it is so excellent that those squeaky wheels that are really going after restitution of builders are getting more than their fair share. I will use my math background here to show you what I mean. If someone is building 40 homes, and say the insurance premium he pays to assure quality is \$2,000 per home, theoretically there is \$80,000 in the fund. If a builder builds those 40 homes and 39 of the new owners do not complain, some people out there are smart enough to know there is \$80,000 in the fund and they know that as long as their claims are realistic they can get close to the cap now, which is \$20,000, without very much difficulty. I am not suggesting that the warranty people go overboard in satisfying the claims unnecessarily, but they have been very accommodating in the experiences I have had in this.

The other thing I am concerned about from a consumer point of view is that unless the registered letter is received within a year of occupancy or of taking over the new home, the claims are not satisfied. It is very difficult for a new home owner if somehow, through the inspection process, say a major component of the building was put in incorrectly, say a main beam in the basement that maintained the whole building and had to be replaced. The \$20,000 might not be enough to satisfy that kind of claim if it were in fact discovered, but if you discovered something like that while doing a renovation in the basement two years after the home was purchased, at the present time, technically, it would not be covered.

Mr. Heron: No, it would be covered. It is covered under the structural warranty.

Mr. Elliot: So it is up to five years for the structural warranty.

Mr. DiIorio: And the coverage is now \$50,000, not \$20,000.

Mr. Elliot: It is \$50,000?

Mr. DiIorio: Yes.

Mr. Elliot: Good.

This is the kind of thing that is going around in my mind with respect to expanded jurisdiction: The way the Ombudsman's office works is that if there are grievance procedures in place in any way, shape or form, they are all finished before that office starts looking at the problem. In our concern as a committee, what we have to be conscious of is the type of thing that I thought both of my colleagues' questions, the second-last two, were getting into, which is that 98 per cent of the consumers might be quite happy but the other two per cent might not be happy and might not have been satisfied in fact by the present process.

The way I see it is that having some sort of an outside group with the power to investigate there would be a real asset to the building trade, because it could stop the kind of thing that I started my dissertation with, for one thing, and say, "Look, you have been satisfied and you really have no recourse, in our view, for further action against the program."

The other thing is that if there was a substantial claim against the program and somehow it got lost in the process, compensation could be paid to that kind of an individual.

That is what the Ombudsman's office is there for. It is not to fix a program that is broken, as you alluded in your presentation, Mr. Heron. I submit that your program is not broken.

I submit that possibly another avenue of reflection here might be that with very little output of cash—in fact, in the preliminary figures that we have there would not be very much needed on the basis of complaints they have received to this point in time—it would in fact enhance the program.

Mr. Heron: With regard to your comment, we live with squeaky wheels, whether they are in the program or whether you have a high profile or whether you are a builder who hangs on and lives with the program. Squeaky wheels will always be there; that is just life, the way it is.

The program is working, as you have said. You have said it is a fine program; we agree with you.

I would defend my statements in saying if it's not broken, don't fix it, and the reason I say that is that if another avenue is opened up to the squeaky wheels or to people thinking there are other jurisdictions there, it may well be that the program that you think is not going to cost an awful lot of money may become a big problem for you down the road. At the moment the program is working, and accept it for what it is. It is doing a fine job.

Mr. Bossy: That falls right in line with what I had wanted to ask concerning fixing what is not broken. I would likely need an answer from the Ombudsman's office, because if the program is such that it is operating so wonderfully—and we know there is no such thing as a perfect program—there must be within your office enough reasons somewhere along the line to have put it on the agenda for this committee to consider the expansion of jurisdiction to include this new home warranty plan. If it was not an issue of any significance, I do not think we would have these people in front of us, so I would like to have an explanation from the Ombudsman's office as to why are we here on this deal.

Mr. Zacks: We are here for a couple of reasons. In our experience, we do receive a mere handful of complaints a year against the program, not very many. There are a number of reasons for that. First, as Dr. Hill said in

his position paper, the program appears to be working well, because we do not get that many complaints.

The second reason is we have been telling people since the program's inception that we do not investigate their complaints. In my experience, where they do have a right of appeal to a CRAT or an Ontario Municipal Board or an Ontario Highway Transport Board or any other tribunal where there is a limitation period, people often miss that limitation period. Here we are talking about 15 days. There are a number of people who come to us after that 15 days has expired, and there are a number of reasons for that.

When the limitation period is that of a governmental organization over which we have jurisdiction, we can still investigate the merits of that complaint. Those the Ombudsman believes are meritorious he supports and those that he believes, after an impartial investigation, have no foundation he does not support. This committee has seen the results of the kinds of complaints he supports.

The Ombudsman looks at the home warranty program as a governmental function. Even though it has been described as a type of insurance program, there are insurance programs which are governmental functions in this society. The Workers' Compensation Board, the travel insurance scheme and the crop insurance scheme are pure insurance programs, but we have jurisdiction over them because of the way they are structured and set up. We have no jurisdiction over this type of insurance program because of the way it is structured and established. Fundamentally, in the Ombudsman's view, this program is performing a governmental function, but we do not have authority over this type of program as a result of the wording and nature of our legislation.

A few years ago, we received a complaint from a home purchaser which essentially was a complaint against the program and the way that program decided his complaint to it about a problem with the way the home was built. That individual was referred by us to the tribunal and the tribunal supported the program. We investigated the tribunal's decision and supported the complainant. It was brought here. The program attended, the Ministry of Consumer and Commercial Relations attended and the chairman of the CRAT attended and addressed the committee. The result of all these deliberations and discussions was that the complainant ultimately received \$20,000, because he had fallen through the cracks.

This whole notion of fixing and falling through the cracks—whether or not they are intended to be puns upon this process—concerns me a little bit because, as some of the members have picked up, there is a basic misunderstanding of what the Ombudsman is about. It comes through in the presentation made by the association. The Ombudsman is not the Ralph Nader type of advocate who picks agencies on which to do audits, inquiries and thorough investigations. We do not do that; we do not function in that way.

The Ombudsman reacts to complaints from the public just the way the association reacts to them. We also adhere to the association's credo that the best consumer is an educated consumer and go to great lengths to educate the public about the role of the Ombudsman and the rights that individuals have in Ontario in terms of resolving complaints.

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So to answer your question after this lengthy introduction, the reason is that the Ombudsman believes that the program is performing a governmental

function. It is regulating a relationship between home buyers and home builders through the mechanism of the association. The association has been designated as the body to operate this program, and because of a quirk in our legislation that apparently does not exist in Australia, we believe we do not have jurisdiction over this program.

Nevertheless, we do see complaints coming to us, although they are admittedly a small number. But the ones that we are able to assist—and that one complaint that did come to the committee and was supported by it caused the Ombudsman a great deal of concern because if there is one individual who has fallen through these very narrow cracks, there may be one or two others. If the public knows that the Ombudsman is available to do impartial, independent investigations without any vested interest or partisanship in terms of the association, of the program or the individual, there will be some satisfaction in knowing that either the program has acted fairly or it has not; and where it has not, then it will be held up to public scrutiny through this legislative process. That is why it is here and that is why we are addressing this issue.

Mr. Bossy: I just have a question that I possibly should have asked earlier. You say the builders' association has played a tremendous role in the development of the program. What were the reasons for the warranty act to come into play following what there was? Was it because of the number of problems that existed within the industry that we needed to sanction a new act on your behalf?

Mr. Heron: What happened was that we knew there were problems out there in the industry and, as an industry, we said we would rather set up a program before the government set it up; that was the motivation. Then it was taken over by government. I think we have demonstrated in the life of the program that we have worked well together in policing ourselves.

Mr. Bossy: So you were very aware that there were some significant problems out there that needed some kind of solution, and this was one of the areas you did resolve.

Mr. Heron: Oh, yes.

Mr. Bossy: So we know there were a lot of problems, because of what had transpired. Then looking at the mechanisms that were built within the act to police the checks and balances of it, you are very satisfied right now that your industry is actually being checked to the limit so that the consumer can have that kind of confidence; that there is no one else who has to check in any way as a last resort; that no one else should have to look into the complaints that may, as we say, fall through the cracks, or for people who may not have the financial ability to go to the court level, as they can do. As I understand from what you said, you feel that there are provisions now to be able to check all your problems out.

Mr. DiIorio: Mechanisms are in place; there are provisions that deal with today's possible problems. There is also the mechanism in place to fine-tune the focus of the warranty program as problems arise in the marketplace. It has got that ability, and there is a willingness from the ministry to refocus or redirect the focus of the program to meet those particular challenges. Our industry is in full support of that, and we work very closely with both the ministry and the warranty program to fine-tune the operation.

The program is not run by the Ontario Home Builders' Association. It has its own independent board of directors made up of industry representatives as well as consumer representatives, government and so forth. The fact is that we do have the opportunity to nominate eight members to that board, and as an association we review that selection on an annual basis to ensure that the people we do nominate have a community focus and have the same predisposed idea that the consumer is the ultimate individual who must be protected through the warranty program and not for it to be, in fact or in perception, a builder operation. It is not. Its focus must be towards the consumers. Otherwise, there was no point in forming it in the first place.

Mr. Bossy: So by being here today—I am trying to resolve this—do you have enough concern or do you feel threatened that, say, the Ombudsman would be in the background as a tool for consumers?

Mr. Heron: No. The reason for our being here today—one of the things that has been pretty obvious to me is that in the questions coming from the committee and comments from the Ombudsman's office—and I hope it was demonstrated by Alido and I—we are all concerned about the consumer. That is pretty obvious from the questions all around the table.

It seems to me that the last comments we had from the Ombudsman's office almost gave the program a pat on the back in saying that very few problems fell through the cracks and that generally the people there feel there are only a few. Barry Rose, who is the registrar, is sitting at the back. When he hears that, he must be pretty happy with those comments whose source is the Ombudsman's office.

I would also suggest that if you reversed that situation and someone said that very few problems fall through the Ombudsman's office, they would be extremely happy about it as well. I think the program is really running well.

Mr. DiIorio: I think if the Ombudsman's office would review the program as it now exists, it would find a completely different type of operation to what was present in the mid-1980s. It has evolved tremendously, and as I have been repeating, there is a different focus altogether with the warranty program now from what it was perceived to be in the past.

The fact that the Ombudsman's office was able to intervene in a mortgage case back in the past shows the resolve of the warranty program to really come to terms with a situation. Back in those days, the cases were on houses being repossessed by mortgage companies, so there was some doubt as to the fact that this house was now not being sold by the builder, by the mortgagee, who had jurisdiction. That was the first time it ever happened after the 1950s that the government of Canada and different mortgage companies became the largest landlords and home owners in the country. Those were different problems, and again, the warranty program responded to that, so now there is provision that that type of situation would not occur.

The timing of that situation was somewhat unfortunate as well. I am sure Barry will be able to explain in more detail. It was a recognition in the marketplace that that was a fact of life and the warranty program had addressed those problems. It is an evolutionary type of a program, and in all honesty, it is only 12 years old. It has come a long way, and it will continue to grow in the right direction. We are positive of that and we will support that type of initiative.

Madam Chairman: I just want to clarify something. The paper you

presented to us has a 1986 date, but I understand you reviewed it again before its presentation to us in February 1988. Was there any work done on that from the original paper, Mr. Zacks?

Mr. Zacks: Any amendments to the original paper?

Madam Chairman: That is right.

Mr. Zacks: No.

Madam Chairman: It stayed as it was? Is that because you felt there was no need—

Mr. Zacks: No, we still maintain there is a need for it.

Mr. Philip: My final question is this. The comment has been made that there cannot be very many problems since the Ombudsman receives only one complaint or two complaints a year. In the purchase of a home, unlike the purchase of a car or any other major thing, one usually has a lawyer, and the lawyers can be expected to know that the Ombudsman does not have jurisdiction over the new home warranty program. Therefore, why would one expect there to be a lot of people running to the Ombudsman, since they would first run to their lawyer and the lawyer would advise them that the Ombudsman has no jurisdiction? I just do not see that as proof that he would not necessarily have some business if he did have jurisdiction and if the lawyers knew that would be a cheaper route to go.

Mr. Heron: Our argument on that, as I said this morning, is that we think the program is doing a fine job. I can understand exactly the question there, but it seems to us that the program is working.

Mr. DiIorio: If I could be so bold as to make another suggestion, to respond to your particular situation, we have talked to many lawyers who probably do not even know what the function of the warranty program is. In fact, they did not know either whether the Ombudsman's office might or might not have jurisdiction over the warranty program.

Mr. Philip: It does not say much for lawyers.

Mr. DiIorio: It does not.

Mr. Philip: Present company excepted.

Mr. DiIorio: I think probably a valid criticism of the warranty program—it is a situation that Mr. Rose and his staff have been attempting to rectify in the last eight or nine months, and we are confident that they will—is basically getting out to the public the function of the warranty program. In achieving that goal, they added another individual, a necessary individual, to that overhead you referred to, a director of public relations. That person's function is to better explain the role of the warranty program and the rights the individual has under the program.

They have published a whole new series of pamphlets that they make available to every new home buyer. Once the home is registered, it goes directly to him, as soon as that house is enrolled. The information and education process with the consumer is another evolutionary function of the program. That is in place and we are confident that it should explain the rights and obligations of the purchaser and the builder to the home owner, so he can better utilize the services of the program to his advantage.

Madam Chairman: Do you think you could supply the committee with a copy of your code of ethics, so that we do have that? Could you forward that to the clerk, and also the requirements of membership? What if they are not in the association? What if their membership has been revoked? Do they have any power within the system?

Mr. Heron: Just for clarification, membership in our association or membership in the program?

Madam Chairman: Membership in the association, because I understand that the enforcement of the code of ethics is that if members do not adhere to the code of ethics their membership is revoked.

Mr. Heron: Yes.

Madam Chairman: Then how can you enforce your code of ethics if they are no longer a member? What is your way of enforcing the code of ethics on the membership, the people who have to follow the code of ethics?

Mr. DiIorio: Membership in our association, the Ontario Home Builders' Association, is not a prerequisite for registration as a builder.

Madam Chairman: That is my concern exactly. My concern is that you have a code of ethics and have put a great deal of emphasis on the quality of home building that goes on because of this code of ethics. If someone does not adhere to the code of ethics, his membership is revoked. Once their membership is revoked, how would you enforce the code of ethics on these people who are not members of the association?

I would like to see the code of ethics as well. I think that would be helpful, because you have referred to it a great deal. Many professions have a code of ethics and I am just not familiar with yours. I think it would be helpful.

Seeing no further questions from the committee, I appreciate your coming before us today. We had not meant to take so much of your time, but thank you for your comprehensive and thorough answers. We really appreciate it.

The committee will recess now until one o'clock when we will have the Ontario New Home Warranty Program. We have some material here and we will give it out now.

The committee recessed at 11:43 a.m.

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STANDING COMMITTEE ON THE OMBUDSMAN
EXPANSION OF OMBUDSMAN'S JURISDICTION
THURSDAY, AUGUST 25, 1988
. Afternoon Sitting



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Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
Mackenzie, Bob (Hamilton East NDP)
McLean, Allan K. (Simcoe East PC)
Pollock, Jim (Hastings-Peterborough PC)

Substitutions:

McClelland, Carman (Brampton North L) for Mr. MacDonald
Philip, Ed (Etobicoke-Rexdale NDP) for Mr. Mackenzie
Villeneuve, Noble (Stormont, Dundas and Glengarry PC) for Mr. McLean

Also taking part:

Bryden, Marion (Beaches-Woodbine NDP)

Clerk: Carrozza, Franco

Staff:

Wilson, Jennifer, Research Officer, Legislative Research Service

Witnesses:

From the Ontario New Home Warranty Program Inc.:

Assaly, Ernie, Chairman
Rose, Barry, President
Burns, Peter, Vice-Chairman

From the Office of the Ombudsman:

Zacks, Michael, General Counsel
Meslin, Eleanor, Executive Director

AFTERNOON SITTING

The committee resumed at 1:07 p.m. in committee room 1.

Madam Chairman: We can call the afternoon meeting to order. We have before us today the Ontario New Home Warranty Program representatives: Barry Rose, who has been referred to many, many times in the last two weeks, is the president; Mr. Assaly, the chairman of the board, I understand, has come in from Ottawa for today, so we really appreciate that; and Peter Burns is the vice-chairman.

I recognize that you have a presentation to make. I know the committee members have a number of questions to ask, and so I hope you will leave them sufficient time to ask some questions. Begin whenever you are ready.

ONTARIO NEW HOME WARRANTY PROGRAM INC.

Mr. Assaly: Madam Chairman, I am pleased to be here to present our picture. We have given you all a brochure or a binder that has everything in it. I would ask you to turn to where it says "Oral Presentation" at the back for our presentation to you. Is everybody at the right page?

We want to thank you, first, for giving us the opportunity to appear today. You have introduced Peter Burns, who is the vice-chairman, and Barry Rose, the president-registrar.

I am pleased to represent the warranty program, originally established in May 1976 as a voluntary, self-policing program by the Housing and Urban Development Association of Canada, which is now called the Canadian Home Builders' Association.

Before the existence of a formal warranty program, many builders offered a one-year warranty to their customers. In the mid-1970s HUDAC spent considerable effort and money to work out the establishment of a national home warranty program.

I would like to diverge from this for a few minutes, because I was one of the originators back in 1973 and I would like to give you a little information on the history. In 1973, the association started talking about a warranty program with Central Mortgage and Housing Corp., which is now Canada Mortgage and Housing Corp. They wanted to know if we could put in a national scheme across Canada. We formed a committee made up of builders, members from Central Mortgage and Housing Corp. and some consumers, etc. We did a study. HUDAC, the housing association, paid for a study done by Peat Marwick which came up with a conclusion that it was hard to do a national warranty scheme in Canada because of the different situations in the different provinces.

Some of us started to work then on a provincial program. They also said that housing was a provincial matter. I became president of the national association in 1974, and we started working on putting in a scheme for each province. The first province in Canada to come up with a scheme, which was a voluntary scheme, was Alberta. We in Ontario came up with a scheme that we put into effect in May 1976, as it says here. The idea of a warranty scheme at that time was to get the few builders that were not doing a good job and were giving the rest of us that were doing a good job a bad name. We started the warranty program and we then asked the government, and worked with it, to set up the legislation that made it a compulsory scheme in December 1976.

By arrangement with the province, the Ontario New Home Warranties Plan Act was and is administered by a 14-member board of directors. On the board of directors are representatives of the Consumers' Association of Canada, the lenders, the insurers, the municipalities and the provincial government. The remaining are members of the building industry. Most of these members are people who have been with the industry a long time and are mainly interested in seeing that the consumer gets what he is paying for and gets the protection he is entitled to.

Board members of the Ontario New Home Warranty Program are committed to ensure that the consumer is protected against builder bankruptcy and default. The responsible builders who originally established the program and who function on its board today were and are committed to serving the consumer and preserving the integrity and high standards of the home building industry. Who better can measure the homes delivered against standards of acceptable workmanship and construction of the home in accordance with the Ontario Building Code? Who better can judge the technical competence and financial responsibility of builders applying for registration?

The objects of the original HUDAC new home warranty program, outlined in the letters patent of the private, nonprofit corporation, are as relevant today as they were the day they were written:

"(a) To establish, organize and administer in Ontario a new home warranty program for the benefit of persons who purchase or agree to purchase residential housing from builders who are participants in such program and, in connection therewith, to give warranties, commitments, undertakings and guarantees to such purchasers to protect them against substandard construction, faulty workmanship and materials,

"To protect them against the failure of builders to complete the construction of new homes by reason of abandonment or otherwise,

"To protect them against loss of deposits and prepayments made to builders and

"To protect them against all or any other failures or defaults of participating builders;

"(b) Through research programs to achieve a progressive improvement in the quality of housing in Ontario;

"(c) To promote better understanding and communications between builders and purchasers of new homes;

"(d) To provide purchasers of new homes with a forum for complaints and grievances relating to failure of participating builders to fulfil warranties and guarantees so that such complaints and grievances may be dealt with in an expeditious and equitable manner;

"(e) To provide information, educational services and educational material to builders of new homes in Ontario and to co-ordinate the dissemination of information which may be of benefit to the Ontario home building industry; and

"(f) To engage in the development and promotion of such other warranty and related programs as the corporation shall consider to be of advantage to members of the public buying new homes in Ontario."

All these are laudable objects set voluntarily by responsible builders interested in improving the quality of home building in Ontario and in protecting consumers. The goals of the mandatory Ontario New Home Warranty Program today are similar, but the program has evolved and matured to meet the needs of today's consumer.

The building industry was quick to recognize the need for self-regulation to maintain the integrity of the industry and ensure that the consumer was protected. The Ontario New Home Warranty Program has a responsibility to ensure that the home purchasers we serve are aware of the support and assistance we offer. Informed, aware, alert consumers provide their own best defence against exploitation, poor workmanship and failure to deliver what has been ordered and paid for.

The Ontario New Home Warranty Program is working to inform consumers of their rights and the protection provided. At the same time, the program, through technical research and training, is helping to educate builders to improve the standard of home construction in Ontario.

The Ontario New Home Warranty Program which may well be Ontario's most effective consumer-oriented agency, has been operating since its establishment in 1976 without a cent of government funding. Make no mistake, the program is big, a private, nonprofit corporation which has, since its inception, provided warranties on 423,426 new homes. There has been one claim for every 50 homes enrolled in the program. A total of \$34,737,459 in claims has been paid out.

Arising from the more than 500,000 enrolments since 1976 there have been 34,654 conciliations, of which 33,739 have been resolved. These figures come from our weekly reports. Those few complaints which do go to the ministry are usually passed back to the warranty program which handles them appropriately and provides the ministry with a response on the action taken.

I will summarize the way the Ontario New Home Warranty Program works for the consumer. The warranty program is in fact a third party to all disputes between the builder/vendors and purchaser/owners, a feature which does not exist in many other consumer protection programs. First, if there is a contractual dispute between vendor and purchaser, the dispute is mediated by the program and the consumer may be awarded up to \$20,000 for loss of deposit or damages.

Once purchasers become owners, they are provided with a one-year warranty on workmanship, a two-year warranty against leakage of the basement and a five-year warranty against major structural defects. Again, if there is a dispute between the builder and the owner, the program will move in, mediate and conciliate at the request of either party and offer a decision as to the benefits the purchaser is to receive. Maximum coverage is \$50,000. This is a conciliatory, not an adversarial process. In many instances, program staff help to resolve contentious issues between owners and builders that are not provided for as part of the plan.

If either the purchaser or the builder is dissatisfied with the program's decision, it can be appealed to the Commercial Registration Appeal Tribunal. The decision of the tribunal may be appealed by either party or by the program through the Divisional Court to the Supreme Court of Ontario. I understand that the Ombudsman, after a CRAT decision, may investigate on behalf of an owner or a builder.

I understand that the Ombudsman reported on one case from 1982-83 which

was satisfactorily resolved. His written submission of 1986 reported that he had received one or two complaints a year. In 1986, there were 63,707 new homes enrolled in the program. In 1988, the Ministry of Consumer and Commercial Relations reported receiving 52 inquiries, mostly related to 1987 home purchases. Most of these were forwarded to the program for investigation and action.

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In 1987, 73,220 homes were enrolled. To date this year, 43,000 have been enrolled. The 52 inquiries represent a minuscule number when weighed against the total number of new home owners we deal with and show, in my opinion, that the program is dealing fairly with consumers.

More than two thirds of the nearly 6,000 home builders in Ontario build fewer than five homes per year. Most Ontario builders, particularly in small towns and rural areas, are small, local businesses. Because the Ontario New Home Warranty Program is mandatory, every builder is bound by law to enrol. Since the program's inception, the registrar has refused or revoked the registration of 1,063 builders.

The program, I am proud to say, is ready to meet today's challenges as it met yesterday's: efficiently, effectively and without government funding. In conclusion, we are convinced that the processes of the Ontario New Home Warranty Program are fair and just.

Given the Ombudsman's report of few complaints and the excellent job the warranty program is doing, I do not think it is necessary for his jurisdiction to extend to the warranty program. I believe that, of the 73,000 units built, one complaint in 73,000 is nothing. We are here now to answer any questions you might have. If you do not make them too hard, we will try to answer them. Thank you very much.

Madam Chairman: Thank you. Before we commence, given the interest that has been generated in having you before us today, I would ask the committee to try to keep to the topic, which is the expanded jurisdiction of the Ombudsman in relation to the program.

I would also request that you try to keep your questions to the representatives we have from the Ontario New Home Warranty Program initially. Then, if we could leave a section to the Ombudsman staff and their reaction to the latter part of the questioning, we would separate our questioning and the focus of our topics. I would ask that we try to maintain that, if we could.

Mr. Pollock: Let me first compliment you on your brief. I found it very interesting. One thing I am not totally clear on is that you mentioned a dissatisfied customer might receive as high as \$20,000. Is that the maximum?

Mr. Assaly: No. I said further on that they can go up to \$50,000. We have changed the regulations in the last year, I believe. It covers them up to \$50,000 now.

Mr. Pollock: So you can go up to \$50,000 and that is the maximum?

Mr. Assaly: Yes.

Mr. Burns: It is \$20,000 for a deposit which is at stake and up to \$50,000 for major structural work on the five-year coverage.

Mr. Pollock: How does that compare with damages? If you get a poor foundation and the whole house goes out of kilter, even \$50,000 at today's prices might be a little light. Do you not agree?

Mr. Assaly: I agree, but we have not had any cases like that yet.

Mr. Pollock: No, but then we are not dealing with the prices we are nowadays.

Mr. Assaly: Let me explain. We are a third party to the problem of the consumer and we may be builders, but we are independent because we want to protect the consumer and keep our reputation.

In any case that comes up, the president has the authority to look into it. If there were a serious case like that, we would look into it and come up with some solution. We have, in the past, made solutions to different problems that were more than what is in here, but we cannot say, because it might happen in one case in 100,000 that we have to set that figure in our books. Otherwise, we would have to see that the fees went up, and we are trying to keep the cost of housing to a minimum, if we can.

Mr. Pollock: I tend to agree with you that basically \$50,000 should amply cover most repairs, but there always could be that extreme circumstance where \$50,000 would not even cover it.

However, I was a little surprised that you said you refused to register 1,063 builders.

Mr. Assaly: That is right.

Mr. Pollock: That is rather high.

Mr. Assaly: Those are builders who did not give the warranty or who, we felt, on registration—the registrar has the advisory committee and he has the final say as to who is allowed to be a builder in Ontario. Barry, do you want to speak on that?

Mr. Rose: That figure represents two groups of builders. One is the builder who is refused registration because he has not shown the technical competence, honesty and integrity and the other factors required by the act. That is one part of that 1,000-plus figure. The other part is builders who have had their registration withdrawn from them because of their performance.

The larger group is the group that is denied registration. In many cases, those may be ex-builders who have had their registration revoked and they come back again under the guise of another company. Because of our system of cross-reference and checking, we determine that builder was involved in another case and therefore he is refused registration in a new project.

Mr. Pollock: Then the same person's name could figure in there maybe three or four times. In other words, he has changed his name and it could be figured in there three or four times.

Mr. Rose: Our tracking system is quite good. Corporations and their officers and directors are all held within our file on each builder, so if a person has been a principal of a firm two years ago and it got into trouble with the program—sales were a substantial amount of money—and tries to come back as a principal director or officer of another company, we will not allow

that person to be registered until he pays back the money to the program; or we may decide that no, he cannot be registered because he has not carried on his business with honesty and integrity.

Mr. Pollock: I hear what you are saying but, once again, you have refused him twice. Is that figure figured in there?

Mr. Rose: No, it would just be the one business.

Ms. Bryden: I have been very interested in the work of the warranty program. I have had quite a number of cases, and they do not all feel they have had satisfaction, particularly any sort of compensation for the late ability to move into the house or for defects on which there does not appear to have been agreement between the inspector from the program and the owner.

When did you institute the new policy where they do get some compensation for late accession to the house?

Mr. Assaly: Just this year.

Interjection: Closings after September 1.

Mr. Rose: Yes, any closing after September 1.

Ms. Bryden: Of this year?

Mr. Rose: Yes.

Ms. Bryden: And what happens to people who had that problem in 1987?

Mr. Rose: They are not covered. The regulations did not take effect. There is no retroactivity to a regulation.

Ms. Bryden: What about the monitoring of the differences between the two? How far back can that go on the structural defects if they are still arguing? In one case, the owner has gone to court. Does that rule out the period in which he can get any sort of compensation? Does that have to be settled in the courts first?

Mr. Rose: The first thing would be that, once we have been notified within the one-year time limit for a warrantied item or two years for a leaky basement or five years for a major structural defect, that notice is on file with the corporation; therefore, the claim is valid.

What may have happened in the case you are referring to is that there is a matter of a court case and, because we have a right of subrogation, we generally would wait to see what would happen with the particular court case and then make the settlement with the purchaser if there were an additional loss.

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Ms. Bryden: What if the time limit had run out?

Mr. Rose: As long as the claim is made within the one-year period, it could wait three, four or five years. We have had cases where the claim has been made and it might be two to three years before it is finally settled, very often because of the matter being taken to court.

Ms. Bryden: Have you any figures on how many cases went to the Commercial Registration Appeal Tribunal?

Mr. Rose: Yes. In your folder, you will find that we have given you a breakdown, for 1986, 1987 and 1988 to date, of the number of appeals by builders and consumers—it is page 23 of your binder—and there we have set out the appeals and the final distribution of the appeals.

Ms. Bryden: Does that confirm my impression that very few of them go?

Mr. Rose: A very small proportion go on to CRAT. Most of them are dealt with by the Ontario New Home Warranty Program, by our conciliatory process.

Ms. Bryden: Just one question I asked this morning: it was suggested you people would be better able to answer. With the recent Supreme Court of Ontario decision saying that the program should apply to tenants in condos that are built mainly for investment or where they may be renting a considerable number of the units, do you intend to appeal that decision which says the program should apply to those tenants and any complaints they have about structural defects?

Mr. Rose: On that appeal, we were going for the judgement that came down, more or less; the judgement was in our program's favour. We do not intend to appeal, although I gather there was an article in the Globe and Mail, yesterday morning I think, that the other people who joined with us in that hearing at the Supreme Court have decided to appeal. The program is not appealing the decision. We are satisfied with the decision.

Ms. Bryden: So you are in favour of that extension. It will cost quite a bit more, I suppose. Do you have any idea how much more it will cost the program?

Mr. Rose: No. Generally speaking, our condominium claims really relate more to common areas than they do to the particular units. That is why we have taken new initiatives—I think they are also in your binder—with respect to acquiring security from builders to warrant us for the deposits and for possible structural defects. I will call them common element warranty items.

Mr. Burns: And they will start paying premiums now for those projects if the decision is upheld, so the insurance fund will be enhanced by those premiums against potential claims.

Mr. Elliot: I would like to add my congratulations and thanks to those who have already said thank you for a very good presentation here. I think, by the luck of the draw or by request, your coming in on the last afternoon is a little sad, in that if we had some of the information in the binder before this time, we might have saved a little time in our previous periods of testimony.

In glancing quickly through the statistics, as I indicated, this morning I think, the Ontario New Home Warranty Program people should be very pleased with their record to date. It is a very impressive program and I do not think very many people are getting through the cracks in the particular program.

With respect to expanded jurisdiction, I am finding the last two pages of your brief very interesting and I have a question to ask with respect to that. You have enumerated five provinces, four other countries and state that

42 states of the United States have warranty programs of one type or another. Then on the second page, you indicate that in the United Kingdom and in Victoria, Australia, there is no appeal to an Ombudsman and that there is an Ombudsman available in those jurisdictions. I am wondering if you picked those two out of the number, or because of the similarity of those programs, those were just examples. In the 51 jurisdictions you have taken a look at, is there any place at all where an Ombudsman has jurisdiction over a warranty program?

Mr. Rose: Yes. In Australia, for example, in the state of New South Wales, because the warranty program is a part of the government, the Ombudsman there has jurisdiction over it. Our research indicates that where the warranty program is part of government the Ombudsman has jurisdiction, and where the warranty program is free-standing with an appeal process—I think in Victoria and in the United Kingdom they still have an appeal process—they are not part of the appeal to the Ombudsman.

In the state of Victoria, for example, they have an Ombudsman and I think in fact the Ombudsman's reports have reflected on Victoria in other matters, but there the warranty program has its own appeal system and the Victoria Ombudsman does not. Their program is very much like ours, as is the UK program.

Mr. Elliot: There is just the one instance then that you are aware of in which the Ombudsman would have jurisdiction?

Mr. Rose: I know of a government (inaudible) which is in New South Wales.

Mr. Assaly: That again is because it is government.

Mr. Rose: It is government, right.

Mr. Assaly: We are not government.

Mr. Elliot: Understood.

Mr. Philip: I had some questions on your statistics. Forgive me if I am a little dense on this, but I am not sure that I understand all the abbreviations. In the year 1986, you have MSD. What does MSD stand for?

Mr. Rose: A major structural defect.

Mr. Philip: Okay, I should have figured that out.

Mr. Burns: We should have said it.

Mr. Philip: Am I correct that if I look at your statistics, those going to the tribunal, the statistics end up as 17 decisions upholding the tribunal as compared to four for the claimant? Is that correct?

Mr. Rose: Yes. Could I explain this? Many of those claims, as you mentioned, are major structural defects. What happens is that the one-year warranty runs out and very often the owners then discover, maybe six months after the warranty runs out, or at two years or two and a half years, that they have discovered something. The only recourse they have is to try to convince us and the tribunal that it is in fact a major structural defect when it is not.

That is why you see a large number of claims through the system relating

to major structural defects. It is used as an attempt to use the program when your warranty has expired.

Mr. Philip: On that point, would you agree from your knowledge of the operations of the Ombudsman, that with other tribunals, where in fact it is a technical fault such as somebody not filing by the right time or something like that, which is what you seem to be alluding to, the Ombudsman has the right to suggest compensation on the merits of the case itself and not simply on the technicality of the time?

I guess if I were a consumer, I would want the protection of the Ombudsman so that I would not have to try to put something through a bracket that it really probably does not fit, simply because it is the only way I can get any kind of satisfaction.

Mr. Assaly: Could I answer that in that the consumer is well protected. There are 72,000 thousand homes with one complaint to the Ombudsman. It is not even worth talking about.

Mr. Philip: I think we dealt with that this morning. We said that if people know the Ombudsman does not have jurisdiction or are told that if they call their local community information office or their lawyer, then they are hardly going to complain to him. I am not going to call a Supreme Court justice to see whether I can claim on my workers' compensation because I know I have a different avenue that is open to me. I do not think that proves anything.

Mr. Rose: Can I just add a little bit there. On the one-year warranty, if the claim comes in a week or two later, we are not saying it is not allowed. We have a test of reasonableness. We will look at that, even with some major structural defects that we have had lately.

Where there have been claims for major structural defects, we have decided that in the interest of the consumer it is more appropriate that we arrange to have the particular item repaired. We are not slavishly adhering to the time limitations. But there are a number of major structural defects where we have to establish the principle because if we did not establish the principle of what is a major structural defect and what is not, then we would find that the integrity of the program would be in jeopardy.

Mr. Philip: I want to follow up on what you said earlier, Barry, about getting the bad guys out of the business, so to speak, and the number of licences or authorities that you have suspended. Am I correct in saying that you would have a registration of the directors, but you would not have a way of getting at who has equity in the company?

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Mr. Rose: They have to provide us with information as to the shareholders.

Mr. Philip: As to the shareholders?

Mr. Rose: Yes. We know who the officers, directors and shareholders are, because we get a financial statement and a net worth of each, so that gives us an idea. Again, it may be an equity shareholder who may have appeared before as a principal. Even if that is the case, they would not be registered.

Mr. Philip: You can in fact find out. If I want to open up another

company and I go and get a different board of directors and want to have ownership by way of mortgage or loans or liens against a company, then you can find out that I really am in that business.

Mr. Rose: Yes. The one thing where we cannot do it is if you just become an employee of the company and not an officer.

Mr. Philip: I could have my mother-in-law own the company and I could become the president of the company.

Mr. Rose: No, not the president, but you could—

Mr. Philip: Manager.

Mr. Rose: —become a general manager.

Mr. Philip: And build across the street?

Mr. Rose: Yes.

Mr. Burns: You would still have to convince the program that you have the capability to be a builder.

Mr. Rose: The technical capability.

Mr. Burns: The technical capability, and the program inspects the few starts of any new builder to make sure he knows what he is doing.

Mr. Philip: One of my colleagues, whom I have a lot of respect for and who is a lawyer, tells me that a lot of the problems, not now maybe but recently, have been offshore builders or out-of-province builders who have come in and have disappeared again. What do you do then when somebody comes from another country and says, "I am a builder," and wants to build an apartment building or a condominium? Was that a problem a few years ago? Have you corrected that problem?

Mr. Rose: I can recall only one case of a builder who came from offshore, became a registered builder, built some houses and then left the country.

Mr. Philip: Okay. With regard to the tribunal, one of the things that strikes me is that I do not know of any other tribunal where one side has counsel the way you people do. If I go to the Workers' Compensation Board on an appeal, I do not see a litigation lawyer there upholding the original decision of the Workers' Compensation Board. Therefore, the ordinary guy can go with somebody who may not be a lawyer, like myself or a paralegal person, or present the case himself and not be faced with a litigation lawyer who is out to try him rather than try the program. I am wondering if your structure is not overly legalistic and all the more reason why perhaps someone might justify the need for going to the Ombudsman, where the resources are available.

Mr. Rose: I understand that somebody can go the Ombudsman after the CRAT decision is taken. Generally speaking, we are trying to reduce the number of appeals that do go to CRAT by trying to settle. I think the Ontario Home Builders' Association mentioned in its paper that we have an internal committee within the program now that does a pretty strict review of claims being put. The general ones that go usually involve matters of interpretation of the act and the regulations. That is very key to our program. Therefore, we

want to make sure that the precedents and decisions that are established are still conforming with the act and the insurance business we are in.

But they are allowed to take counsel if they want. Many of the people who go to CRAT take friends. They will bring a professional engineer along, for example, or they will bring a quantity surveyor to a CRAT hearing to assist them. There is a wide range. You may notice that a number of the builders who come to CRAT are represented by lawyers, and these are not necessarily all big builders. Many of them are small builders building 10 units or less.

Mr. Philip: Mr. Rose, I gave you notice that I would like, if possible, and maybe you have it in this documentation, a breakdown of your organization in terms of how much money actually goes out in premiums as compared to how much comes in, because I have had ex-employees—not of yours, because it was before you joined this particular organization—of the warranty program who have challenged and said to me: "Go after these guys. They're top-heavy. They have too many lawyers, too many administrators and not enough people out in the field." Often the decisions the adjudicator in the field wants to make—the facilitator or whatever you call these inspectors—are overruled by all this bureaucracy that ties them up in knots. Do you want to answer that? Can you give it to us statistically as well?

Mr. Rose: The 1986 annual report has our financial and administrative—let me give you the philosophy of the program. What we are doing now is adding people because we have realized that we have not been able to keep up with the expansion, the number of new houses being built. We are making a concerted effort to do two things: improve the services to the consumer by adding more conciliators, and improve the services to the builders by getting more into builder education so we can make the builders more effective.

Right now we have 121 staff, only 19 of whom I would call administrators. We do not employ a lawyer as part of our corporate structure. We use an outside legal firm. The philosophy now is to decentralize the decision-making and the claims settling down to the regional offices so that the district managers have the authority to settle claims of up to \$10,000, I believe it is, without any reference to head office.

I think some of those comments may have been valid a year or two ago, but they certainly are not now, because I think the speedy settlement of the consumer's claim is essential.

The one thing we do have to keep centralized is the builder registration function. To have that tight centralized control and the tracking system through our computers is the only way we can ensure that only qualified builders get into the system.

Mr. Philip: I would appreciate a breakdown. I am sure you can get it for me. It may be in the annual report among other things.

Mr. Rose: Would you like a copy of the annual report?

Mr. Philip: I think I have one in the office.

Mr. Assaly: I would just like to add to what Mr. Rose said. You say there are too many lawyers. We do not have any lawyers on staff. We are all builders, consumers, etc.

Mr. Philip: But you have them on contract, whether you have them on staff or not.

Mr. Assaly: We have a lawyer on contract like everybody else, but we do not have any lawyers trying to administer this program. The program is administered by builders, consumers, lenders—people who are involved in the building business.

Mr. Philip: I would be interested in knowing what you are paying out in legal fees in a year, either as a percentage of your total budget or whatever, because I am not sure all of that is justified.

Madam Chairman: Could you, Mr. Philip, give an explanation of how that is relevant?

Mr. Philip: I think I have been making the point, as someone who has tried to assist constituents, that their process is overly legalistic as compared to other tribunals. If it is an insurance program, I would also like to know how much of that premium people are paying for one way or the other through their purchase of the home, how much is actually going out in payments back to that person or in professional development of the industry which flows out indirectly to other people, and how much is going to administration and to legal costs to simply defend the status quo.

Madam Chairman: How does that relate to expanded jurisdiction?

Mr. Philip: One of the things both the builders and the program are saying is: "There is no need for an Ombudsman to look at it. Everything is going marvellously well. There were problems a few years ago and we have them all under control." I guess I was most critical of you a few years ago. I do not have new homes going up in my own riding and I am no longer Housing critic, so I do not know whether you have improved. I am just asking for the proof. I immediately assumed that the moment Mr. Rose joined the team things would improve, because I have seen him improve things in other incarnations. I just want the proof, none the less, because I have to be objective.

Mr. Lupusella: What is your point? I do not understand.

Mr. Philip: You rarely understand anything around here.

Madam Chairman: Mr. Philip, do you have any further questions?

Mr. Philip: I may ask a few questions later on.

Mr. Villeneuve: You have nearly 6,000 home builders and you state that about 4,000 of them build fewer than four or five homes a year. Where do the bulk of your problems come from, the 4,000 that build fewer than four or five homes a year or the large volume builder?

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Mr. Rose: It is a matrix, really. It not only depends upon the size of the builder but also where he is building. There has been no doubt, and I think it was pointed out this morning with the Ontario Home Builders' Association people, that the greater Metropolitan Toronto area has been the most overheated area in Toronto, and probably that is whether you have been a small-, medium-, or large-size builder. You are probably having more problems, because of all the factors that they talked about, than you would in, say,

Ottawa or Kitchener or Windsor or Thunder Bay or Sudbury.

So it is a function of that, and I think if you look at the phone calls, which will give you an indication, head office, on a high day, will get 1,500 calls a day. Mind you, 65 per cent of the building activity in Ontario is handled by our Toronto region, which incorporates head office. In the other areas, the figures indicate that they run on a fair average for all of them. Thunder Bay is probably the lowest, but then there are probably fewer houses enrolled in Thunder Bay than anywhere else.

So it is a difficult question to answer.

Mr. Villeneuve: Deregulation, in your opinion, is a pretty big stick to hold over a builder's head when it comes to trying to settle a conflict or trying to prod him into meeting his share of responsibilities. Are you satisfied that the threat of deregulation is sufficient, or should you go beyond that?

Mr. Rose: I think the problem is that it is sort of a death penalty and the builder is either in or he is out. I think what we are trying to look at are other sanctions we can take against the builder that may not necessarily be the complete cutting off of the builder from business but other penalties and sanctions we can bring against the builder to try to bring him into line, because losing your ability to do business is quite a serious action.

Mr. Villeneuve: Your prime raison d'être is to provide quality homes to the consumer. Do you feel the announcement by the Ministry of Housing recently may make your job even more difficult with the 25 per cent requirement for affordable housing? Do you feel you may see some cutback in quality, or what is your reaction?

Mr. Rose: I think that is the sort of issue, thank God, we do not have to come to grips with. If there are any ownership homes in that category, the two categories, we ensure and guarantee that house will be built in accordance with the Ontario Building Code. That is the underpinning of the whole program, that you get a house finished in a workmanlike manner for the price you pay and it is built in accordance with the building code. That would apply to any house built in Ontario, whether it was built under a new provincial government initiative or it is any new ownership home.

Mr. Villeneuve: Is it your opinion that most builders in Ontario barely meet that code or do they exceed it?

Mr. Rose: I think that generally the quality of building in Ontario is better than the building code. The building code is minimum and the building industry is above it.

Mr. Burns: Market sets; the market prevails.

In answer, partly, to your first question, an interesting thing is that a builder can be building 10 houses a year for years and do an excellent job in a small municipality. It is when they suddenly become a 50-house builder and they have not expanded their management capabilities—and a 200 can continue to be a 200—it is when they suddenly get jumped to the next category and do not put everything else in place that the warranty program starts to hear the complaints about workmanship.

Mr. Villeneuve: That is an interesting observation.

Finally, and on a totally different subject, we have modular homes or the homes that are prefabricated. They roll to the site on a set of triaxle wheels and then they are bolted to a concrete foundation. Do you have jurisdiction over these homes as well?

Mr. Rose: We have jurisdiction only if the complete building process is done by one builder. Generally, those homes are not covered, because somebody else pours the foundation. They manufacture the home somewhere else, they bring it in, they put it on the foundation somebody else has poured, and the wiring and other work may be done by a third party again.

Mr. Burns: The purchaser is almost then the contractor, rather than a vendor of the package.

Mr. Villeneuve: This becomes even more of a problem if this prefabricated home maybe came from Quebec or another province.

Mr. Rose: As long as they are registered builders in Ontario, I believe; a few are in Quebec, who are registered builders in Ontario who bring a product in from Quebec.

Mr. Villeneuve: They could be building in Quebec but be registered here.

Mr. Rose: Providing that the whole house was done by the particular builder or manufacturer. As you have noted, we have had the manufacturing industry on this board since its inception. Many complaints are from rural constituencies particularly, where the owner contracts a bit of the house out, has some of it prefabricated for him; those houses are not covered. In fact, we have had one or two cases go to the Commercial Registration Appeal Tribunal about those situations but our act is very explicit, that it must be the builder-vendor who builds the whole home.

Mr. Villeneuve: Whether or not you come under the jurisdiction of the Ombudsman's umbrella, I think it will still be interesting looking at the statistics based on the previous year and going into next year with the affordable housing requirement being met. I know I will be one of the ones who will be watching.

Mr. Elliot: I am looking at the year 1987, the statistics entitled "Commercial Registration Appeal Tribunal (CRAT) Decisions and Intentions to Appeal" in the binder.

I would like a little clarification. What is confusing to me is that in looking at the grand totals and the disposition of the particular appeals or intentions to appeal, I cannot add up the numbers. I am wondering if all of the appeals in the left-hand column have been settled or if there is still a number of them outstanding?

Mr. Rose: In 1987, you would find that the appeals to CRAT of 71— The second page for 1987 goes across and is completed— I think the best way to take these charts is to take them like this and put them together. They basically go like that.

Mr. Elliot: This is what I attempted to do just by flipping them.

Mr. Rose: What you are saying is that on the 71, you have found some which have not— Most 1977 claims should have been settled out by now. I do not think, except for maybe one or two appeals to the Divisional Court, that we have any outstanding.

Mr. Elliot: You mean the 1987 ones.

Mr. Rose: I am sorry, 1987.

Mr. Elliot: Maybe I could be more specific. I would just like to get a flavour of what has happened here. In the major structural defects row, there are 39 under the number of appeals.

Mr. Rose: Yes.

Mr. Elliot: The program is upheld in one case and partially upheld in two cases. That means there is a difference of 36 cases. Could I make an assumption that most of those 36 were settled before they actually got—

Mr. Rose: They will be in the 24 and 10 figures where you have intent to appeal, but they were settled in advance of establishment of a CRAT hearing date or they were settled once a CRAT hearing date was established. There are two kinds of things. Very often we can settle an appeal before we even get to the establishment of a date. Then very often when the date is established, when they say, "Okay, next month, September 15, you're on," a lot of people settle, particularly in the case of builders. Very often, they will comply with what we want to do.

With those major structural defect cases, you will notice some are partial. Very often there will be a number of matters the person is appealing. The tribunal will decide that some are and some are not. We will have to satisfy them on one part but not another.

Mr. Elliot: I would be making a correct assumption, then, that as things presently stand, of those 39, the Ombudsman would have jurisdiction with only the three which are finalized in the statistics. If they were not happy, they could go to the Ombudsman.

Mr. Rose: That is right. I would presume it would be the three where the program was upheld or partially upheld.

Ms. Bryden: I just have one major question. In your years of operation, you have had 34,600 conciliations of which 97 per cent were settled. But if you calculate what the other three per cent would be, it is more than 1,000 people. Do you not think that would justify extending the jurisdiction of the Ombudsman to the work of the board or the work of the program in order to see whether those 1,000 people have a reason why they did not get a resolution of their problem and whether that reason could possibly be related to the process?

1400

Mr. Rose: Those are actually claims for conciliation that are still in process and have not been completed. That represents the active files where the conciliations have not been resolved. So it does not represent from the first day of the program that we have carried forward 700 files. Those are just unresolved existing files which we hope will gradually be cleared off. We always have a roll-over of conciliations in process. It is very low. That 700

really represents the last year's housing production of 73,000 units, which I guess is what, 0.1 per cent. A year from now you might see that report with 500 or 900 files but it represents files that are currently open. Everything eventually is resolved but those are files that are currently open that are being handled by our conciliators.

Ms. Bryden: My point is still valid that there is a substantial number who feel they do not get satisfaction.

Mr. Rose: These people have not had the opportunity yet of having a conciliation. They are outstanding claims with the program and the particular builder. That group can include a person who has a deposit claim. About one third of those will be deposit claims and the other two thirds of that 700 will be people who are owners and are asking the program to conciliate a dispute between themselves and the builder. Basically, what they are, they are unresolved. Really, one of two things will happen. They will either resolve them satisfactorily or the purchaser will decide that they want to appeal to the Commercial Registration Appeal Tribunal. So they just represent the backlog.

Ms. Bryden: I guess my question then is, do you see any role for an extension of jurisdiction to the Ombudsman in dealing with the people who feel that they have not received satisfaction?

Mr. Assaly: These people did not say they are not satisfied. It is in the process.

Mr. Rose: These people have not been dealt with yet.

Mr. Assaly: There is nobody who can handle the process better than we can.

Ms. Bryden: No, I am not saying that it is just the ones that have not been dealt with. But I mean, over the years, there have been a considerable number who have felt they did not get—

Mr. Assaly: They are in the process of being settled and there is nobody who can do the job better than we can because we are in that business.

Mr. Rose: I think that talking with our counsel, there is some indication that the Commercial Registration Appeal Tribunal was very strict and narrow in its application of the law. The point I am coming to is that the Ombudsman can investigate a CRAT decision, but the tribunal is very thorough in its investigations of the process and procedures that the program took in arriving at its position.

There is the provision of expert evidence, of photography. It is not a sort of file processing thing. Everything that we do is on the ground, in the home or in the case of a condominium, in the building, right on the spot. We are not dealing with a worker's file or with a social assistance recipient's file. We are dealing with the actual bricks and mortar, with the home owner and with the builder right on the spot.

CRAT is very concerned that all those matters, the processes and the investigation, the use of expert consultants by ourselves and also by consumers, are all brought before the forum of the tribunal and examined in detail by the tribunal. Even the makeup of the tribunal when they hear these cases reflects and shows some knowledge of the industry. So I think the

present situation where the Ombudsman does have the right of review of the CRAT decision is probably at the right spot rather than prior to the tribunal's decision.

Ms. Bryden: Does the tribunal award costs?

Mr. Rose: No, it does not. It has no power to award costs. I think one of the appealing features of the tribunal is that it is someplace that the ordinary citizen, the ordinary home purchaser or owner in our case, can go without having to get involved in an expensive court proceeding. They can just go as a person and talk to the tribunal. It is just like a small claims court. It is even better than that. There is no need for counsel. They can bring friends. If they know people with expert opinions—qualified architects, professional engineers—they can bring them along to the tribunal; they can make their comments and present their case.

Mr. Philip: You have not sat in on one of those lately.

Mr. Rose: I have sat in on a number of them.

Madam Chairman: Any more questions from the committee, either to the representatives of the Ontario New Home Warranty Program or the Ombudsman?

Mr. Philip: I had a couple of questions. There is a limit of \$50,000 maximum per unit. Is there still a limit on the total amount that can be paid out to a condominium?

Mr. Rose: It is \$2.5 million. It was increased from \$1 million to \$2.5 million in June 1987.

Mr. Philip: Why is it, then, that you feel if I purchase a home, then I can get the full amount of \$50,000, but if I happen to buy a newer condominium in a large building, I in fact could conceivably not collect the full \$50,000?

Mr. Rose: If you have a major structural defect in your unit, you could get \$50,000, but the common elements of your condominium are only covered for \$50,000 to a maximum of \$2.5 million. Those are the common elements. The pool, the rec room, the exterior walls, the garage, the roof; anything like that which is a common element is covered for the maximum.

Mr. Philip: So you are feeling that moving it from \$1 million to \$2.5 million, then, is realistic, taking into consideration the large costs of condos at the moment.

Mr. Rose: It is a significant increase in consumer protection; that it is.

Mr. Philip: The other is a question that I asked of the ministry, and perhaps I should be fair and give you an opportunity to answer the same question. If I can go to the Ombudsman and get satisfaction for a trip that I have not received to Las Vegas under the travel industry compensation fund, why should I not have that same recourse with something that is much more important than mad money or spare money that I may use to go on a trip down south when I make the most important purchase in my life? Why should somebody who loses \$600 on a trip down south have the recourse to the Ombudsman, but somebody who does not get satisfaction on the most important purchase in his life—namely his home—does not have that recourse? Is that not kind of a

lopsided form of justice?

Mr. Rose: Is there not a difference in the relationship? Our program, which provides protection, we are a third party. Your relationship, when you lose your \$600, is with a travel agency that has taken your \$600, obviously, and you have not got your holiday. As I understand it, then you have to go to a tribunal, or something, to get your money back; I am not sure how that system works.

Mr. Philip: No. The travel agencies and the major wholesalers have to put money into a fund that reimburses me if I do not get that trip. But if I am not satisfied with what that tribunal does, I can go to the Ombudsman.

Mr. Rose: But you do not have a warrant or certificate of insurance from that travel agency when you go on your trip that says, "We guarantee that we will do, this, this, this and this." What you receive from this program is a warrant that guarantees to you certain benefits. I think we are dealing with a different approach—

Mr. Philip: If I do not get a hotel of the quality that I was promised, I can go to the tribunal and get compensated for it. So I do not see the distinction.

Mr. Rose: I guess I see it slightly differently, in the context of what we give is a guarantee and a right to claim and protection. You do not have to go to a tribunal; you just have to make a claim, and there is recourse to the Ombudsman after the Commercial Registration Appeal Tribunal.

Madam Chairman: Any other questions from the committee to the Ombudsman or program?

Mr. Zacks: Do we have an opportunity to make some responses?

Madam Chairman: I was going to put you on the agenda, after individuals have left, to discuss just a generic review of the expanded jurisdiction question, unless you feel it would be more appropriate now.

Mr. Zacks: I think it would be appropriate to respond to a small number of points; it will not take too long. Again, from what I have heard from the program, there appears to be a misunderstanding of what the Ombudsman's role is. That stems from the comment made that the Program is in the best position to do the program's job, the implication being that the Ombudsman does not have any business doing the program's job for it. We entirely agree with that.

There is no intention for the Ombudsman to do the job of the program. There is no intention for the Ombudsman to run the Ministry of Health or the public hospitals or to run children's aid societies or any other governmental organization that we have jurisdiction over or were discussing at these meetings.

1410

All the Ombudsman wants to do is simply ensure that in areas where he believes a governmental function is being undertaken, as he believes in this case one is, that the individuals, as few or as many as there may be, have a right to make a complaint to an impartial arbitrator or an impartial investigator such as the Ombudsman.

The Ombudsman's role, as has been said several times by the Ombudsman, is simply to ensure that fairness has been done to the individual. He is not there as a threat. He is not there as a disrupter of normal proceedings. He is not intending to undermine what is apparently working. We are not there to find procedures that are broken and try to fix them when it is not necessary.

The other point I wanted to touch on very briefly is the reference to the minimal number of complaints that the Ombudsman gets. The fact of the matter is, we do get very few complaints against the program itself. That has been stated quite clearly in the Ombudsman's presentation to you. That in itself, as far as we are concerned, is not any reason to deny the Ombudsman or to be a major factor in determining whether or not jurisdiction should be given to the Ombudsman.

While this comment was being made, I quickly looked through our most recent annual report and some other figures that I know, just to give you some basis of comparison. For example, the Ontario Labour Relations Board, on average, provides 10 complaints a year to the Ombudsman. We advance our jurisdictional claim against that body quite vigorously. TVOntario provides approximately one or two complaints, which we investigate. The Boundaries Act creates about two or three complaints which we investigate each year. The Ministry of Energy, four to six complaints; the Ministry of Treasury and Economics, one complaint; the Ontario Land Corp., two complaints made to the Ombudsman.

If the volume of complaints is a basis for determining jurisdiction then I think if you open that up, you will have a whole host of governmental organizations coming to you saying: "It is working fine. There are no real complaints about us. Exempt the Ombudsman." The point we are trying to make is the fact that if there is only one individual who falls between the cracks, as narrow as those cracks may be, there ought to be a remedy to the Ombudsman, because there may be other people who cannot get there and whose complaints should be considered impartially.

The Commercial Registration Appeal Tribunal is a body that we do investigate and have investigated since that body was established. The important point I want to stress is that although we can investigate complaints against that body, the scope of our investigation is extremely limited. We can investigate it, but they have no power to reconsider; they have no power to implement recommendations.

What would be happening, if we do come across a complaint against that body which cannot be resolved or which requires some kind of remedy such as you saw with the Criminal Injuries Compensation Board, would be to bring the matter here, work out some kind of friendly application to the Divisional Court for a judicial review where everybody would agree the matter should be sent back to the tribunal for it to have another look at it or to extend the appeal period and somehow get the issue before the Divisional Court so it can be remitted back to the tribunal.

That is a very inefficient, ineffective way of dealing with legitimate concerns that the Ombudsman believes ought to be remedied. If and when our amendments ever get resolved, that could be an issue we could consider at that time.

Mr. Assaly: In reply to what Mr. Zacks has said, he is referring to all government bodies. We are not a government body. We are an independent body. The government has no part in this. They do not pay anything and they

have nothing to say in this. If you are talking government bodies, that is fine; we are not a government body.

Mr. Zacks: Could I make one brief point?

Madam Chairman: Yes, I would like you to respond to that. That comment has been made a number of times today, and I have let it go by. Do you want to respond to that?

Mr. Zacks: We are looking at government in different ways. We agree they are not public servants. They are not operated by the government of Ontario. They are not administrative units of the government of Ontario under our legislation. But what we are saying is that they are performing a governmental function, a governmental function being one in which this body has statutory authority to regulate the state of affairs between members of the public, home buyers, home builders, in terms of their relationship with each other.

In terms of the way we look at it, they are effectively performing a governmental function that has been delegated to the program by legislation, in essence by order in council under the regulations. The Ombudsman is arguing along those lines. Similarly, with children's aid and public hospitals performing governmental functions; they are not part of government. We acknowledge that—that is why we are here—because we would need special legislation to bring them into the Ombudsman's purview.

Madam Chairman: Since there are no other questions from the committee, thank you very much for coming. I had anticipated this going on a little bit longer today, but I think your folder is so comprehensive, it answers a lot of questions people had about the program specifically. We appreciate your coming before us today and for attending a number of our other sessions so that you are aware of the difficulties the committee was having with the specifics of the program.

Mr. Assaly: Thank you very much. If there are any further questions, you can talk to Mr. Rose.

Madam Chairman: A number of people have already this week. He has been accosted in the hall a number of times.

I have a number of agenda items for the committee. First, is there anything the Ombudsman's office feels it wants to add at this point? We have had two weeks of very thorough, comprehensive presentations, and I just wondered if there was anything you felt you had left out from your point of view. I am certain when we resume our sittings in October, you will have other opportunities, but I just wondered if there was anything you felt needed clarifying at this point.

Mrs. Meslin: I do not think so. I think we would prefer to wait until all of the hearings are finished and until your side trips have been concluded.

Madam Chairman: I do not think we ever did get an idea—although I think we have all picked it up—of where the Ombudsman has a role now within these three areas of expanded jurisdiction and perhaps the potential for where you could come in; the jurisdiction you now have. As I say, with CRAT, you have an ability to get involved after the CRAT decision and only in specific ways, for specific issues or procedures or process. Will you be able to make us some kind of chart that tells us where your jurisdiction is now?

Mrs. Meslin: Yes. We could give you something that would assist you before you go.

Madam Chairman: Great. Thank you. That will help us when we go. While we are talking about when we go, for those who have received the memo, we will be departing on Monday, September 26, to meet with the Ombudsman in Winnipeg, and then going on to New Brunswick. So if there are any changes or if you are unable to attend, please contact the clerk, if you have not done so already.

The other thing is, we have a memo here which the clerk has prepared.

Mr. Philip: Did you say you sent out a new agenda, or is it just the old agenda?

Madam Chairman: It is the old agenda, just to remind people, since we will not be together now until September 26.

This is about the people who presented before us, while it is very vivid in the committee's mind. At one point, I think we questioned perhaps the validity of advertising in the paper as opposed to inviting groups specifically to come before us. Franco has prepared a memo that indicates how much the advertising did cost.

We did restricted advertising in that we did it in one French and all dailies for one day. The cost of that advertising was about \$9,000, to which we received 17 responses. Some of those were more enthusiastic responses than others, and the people who did want to attend were accommodated. Seven made presentations. There was no one who said, "I don't want to come to Toronto or go through the formality." Those people were quite interested in attending. We received, in effect, seven presentations and 17 responses. Many of those had no writing attached to them; they were a phone call or some such thing.

1420

We sent out 372 letters to individuals or groups, provided by the Ombudsman's office, that might have an interest in our deliberations, and to those we received three responses. Then of course we had the four invitees—the Ontario New Home Warranty Program and the three ministries. The second page does break down the individual interests that were served by coming forward. The result, I guess, is that we received seven from the advertisement, four were invitees and three were responses from direct mail.

I do not know whether it serves any purpose other than to identify that there was not enormous response to our advertising, but we did receive some. I will remind you that Mr. and Mrs. Campbell came as a result of the advertisement, whereas some of the larger groups came as a result of invitations. We had a variety of people who came as a result of the advertisements who may not have been on topic.

We thought you might be interested in that. Regarding advertising of public hearings, perhaps that is something we should consider making recommendations on to the standing committee on the Legislative Assembly. Any comments on it at all?

Mr. Philip: I think part of our problem is that it is the summertime and a lot of the people who are interested are probably involved in organizations and sometimes it is hard to pull those organizations together as

distinct from, say, the situation with the standing committee on administration of justice where there are a lot of individuals. I was going to say, if we had extra time, we should take some of the overflow of the people who cannot get on in the justice committee.

Mr. Carrothers: I am glad you did not say that.

Madam Chairman: We did send out the 372 direct-mail letters, which indeed may have had a response. I think the clerk will continue to see if there are responses at this late date to our mailout. We did not mail out until the third week in July. If they want to submit a written response, we will certainly indicate to them that we are still willing to entertain such a form of presentation.

The other thing was on the subcommittee of which Mr. Philip is a member. We will not be meeting the week of September 21, and we may have to defer that to when we travel and combine it with our travel.

Mr. Philip: Meet on the plane on the way out to Winnipeg or something.

Madam Chairman: Correct.

The final item is that I did go before the Board of Internal Economy this morning, in response to a motion presented by Dr. Henderson, and presented to the board that it consider expanding to the whole committee the number of individuals to go to Australia to attend the international ombudsmen's conference. That would be the whole committee with no substitutions. Since a number of people on the committee had indicated that they were unable to attend in the last two weeks in October, I expressed to the board that there might be as few as seven individuals who would be able to go. We did receive a reply, not in writing as of yet but verbally at noonhour today, that it was denied. They did reaffirm their position of one person from each party to attend the conference in Australia, and each party has put forward the member of its choice. Arrangements have been made and those people are on the attendees' list.

I thought for a moment there was consideration. I think the one concern of the board that was foremost in its mind was that this conference occurs while the Legislature is sitting. I got the feeling that, had they directed their minds to that initially, maybe none of us would have been able to attend. But now that they have committed to three, they have reaffirmed their position on that and were quite supportive of it. Are there any comments on that?

It is becoming quite an interesting little session we have when we go in there. I am not sure who is on the board and who is not, but there are at least 50 individuals in that room and I am not quite sure to whom to direct my attention.

Clerk of the Committee: There are only seven members on the board.

Madam Chairman: There are seven members on the board and yet 50 in the room. It becomes a little bit difficult to know whom actually to pin the decision on in the end.

Mr. Henderson: Since I was the mover of the motion and since the whole issue of committees and travel began to attract some public attention

just after we passed that motion, it does not at all surprise me they have made that decision. I think we can even feel rather—I will not say grateful—pleased that the Board of Internal Economy has held to its original decision.

Madam Chairman: Thank you. Any further comment? If not, we will adjourn, if I have a motion.

Mr. Pollock: I have just one comment. I appreciated your remarks at the start of the committee that we should ask questions of the delegations that come in here in regard to expanded jurisdiction of the Ombudsman, but I think when we go to write the report we will want to be fairly knowledgeable about any of these situations.

Having said that, though, I want to take this opportunity to compliment you on your efforts over the last three weeks in conducting this particular committee. I think every delegation that came before this committee went away feeling it had had a good hearing, with the exception of last Thursday morning, and I think that was a no-win situation. You are to be complimented for your efforts. That is all I wanted to say. I now move adjournment.

Madam Chairman: Thank you. We have a motion of adjournment. We will reconvene on September 26.

The committee adjourned at 2:28 p.m.

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STANDING COMMITTEE ON THE OMBUDSMAN

COMMUNICATIONS FROM PUBLIC
ORGANIZATION

CASE OF MR. O

CASES OF MR. B AND MS. D

CASE OF MRS. J

CASE OF COMPANY S

OMBUDSMAN'S RECOMMENDATION DENIED

WEDNESDAY, NOVEMBER 16, 1988



STANDING COMMITTEE OF THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Bossy, Maurice L. (Chatham-Kent L)
Carrothers, Douglas A. (Oakville South L)
Charlton, Brian A. (Hamilton Mountain NDP)
Cousens, W. Donald (Markham PC)
Henderson, D. James (Etobicoke-Humber L)
LeBourdais, Linda (Etobicoke West L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Clerk: Carrozza, Franco

Staff:

Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon
Wilson, Jennifer, Research Officer, Legislative Research Service

Witnesses:

From the Office of the Ombudsman:

Meslin, Eleanor, Executive Director
Zacks, Michael, General Counsel

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Wednesday, November 16, 1988

The committee met at 10:13 a.m. in committee room 151.

Madam Chairman: If we could call this committee to order, this is the standing committee on the Ombudsman. Today we are going to deal initially with organizational matters and then we will get into specific cases which the committee is dealing with.

I would like to welcome the new members to the committee. I know that you will find this to be an interesting committee because we have a lot of exciting things to deal with over the next few months.

Also, for those who are new on the committee, you do not know it, but the committee sent me these lovely flowers when I had a little baby just a few weeks ago. I want to thank you all as well for that; that was very generous. Between those flowers and the ones from the Ombudsman, I did not have room in my room for anything else, so it was really quite exciting.

COMMUNICATIONS FROM PUBLIC

Madam Chairman: Does everybody have a copy of the agenda? The first thing on the agenda is a report from the subcommittee on communications from the public. The subcommittee consists of myself, Mr. Philip and Mr. McLean. The committee met on October 5 and dealt with three cases before it. Does the committee have a copy of the report?

Clerk of the Committee: I have extras if they wish, but I think everybody has it.

Madam Chairman: It is a document dated November 16. We dealt with three cases: the case of Mr. O, the case of Mrs. L and the case of Mr. L. In the instance of the case of Mr. O and Mr. L, the committee decided—the committee is set up, for those members who are not familiar with it, as communications from the public. So if the public feels that the Ombudsman did not deal with the case fully and fairly, then it has an alternative after going to the Ombudsman. If they have not been dealt with fairly, they can come to this committee and say they felt that the Ombudsman did not do a complete and fair investigation.

In the case of Mr. O and Mr. L, the subcommittee made the decision that the Ombudsman did have a full, fair, complete and thorough investigation of their case, and so no action was taken. We confirmed this to them in a letter. In the case of Mrs. L, it is outlined that the chairman write to the chairman of the Workers' Compensation Board and to the Minister of Labour to express the committee's concern with the inordinate length of time it has taken to complete its review on chronic pain. It further recommends that the chairman write Mrs. L to inform her that the Ombudsman's office investigation was complete and fair.

The subcommittee looked and felt that the Ombudsman's investigation was fair and full. However, we decided that the Workers' Compensation Board's policy review was taking much too long, so we went a step further by recommending to the WCB that it perhaps deal with this a little bit more

quickly and expeditiously. We have received a response from the WCB that it is dealing with this and intends to complete its investigation within the next six months; at that time Mrs. L's case will be reviewed again.

We could certainly provide the details of the three cases to you if you would like, but otherwise we would like approval of the committee to accept the report of the subcommittee on its decisions. Are there any objections to accepting the report? I know it is very difficult when we deal in piecemeal, but I would just like to assure you that the subcommittee deals with these quite thoroughly.

Mr. Carrothers moved, seconded by Mr. MacDonald, that the committee accept the report of the subcommittee.

Motion agreed to.

ORGANIZATION

Madam Chairman: Because of the newly constituted committee we are without a vice-chairman at this time. Mr. Elliot is no longer on the committee and he was our vice-chairman. Could I have a motion for nomination of a vice-chairman?

Mrs. LeBourdais: I would like to put forward the name of Maurice Bossy as vice-chairman for the committee.

Madam Chairman: Do we have a second for that nomination? Mr. Carrothers? Any other nominations? Hearing none others, all those in favour of our nomination of Mr. Bossy? Thank you very much. Carried.

Mr. Bossy: Could I speak to it?

Madam Chairman: Oh, yes.

Mr. Bossy: I have never had it so good. In this life we usually have to make comments, but I will make them very brief. It has been my privilege to have served with the Ombudsman's committee since my arrival here back in 1985, and I have found this committee to be probably one of the nicer committees to be working with, with all the people, because of the reasonable nonpartisanship that the committee usually displays in resolving the problems. Also, Madam Chairman, it has been a pleasure to serve here on this committee under your chairmanship because the committees have functioned very well. They have been disciplined to a certain degree, whereby the parliamentary procedures have been adhered to. I look forward in any case, if I should be needed, if you go and have another baby—but you did not take any time off, so I did not have to sit in your chair. It has been a pleasure to have worked under your chairmanship. I look forward, if needed, to helping you with the task.

Madam Chairman: Thank you, Mr. Bossy. The baby is coming home shortly so you may yet get your chance.

1020

COMMUNICATIONS FROM PUBLIC

Madam Chairman: The next thing on the agenda is the establishment of a new subcommittee on communications from the public. Not only do we need to

establish a new committee, the subcommittee decided at its last meeting that the committee should be increased to four members. Currently it had just the chairman and one person from each of the opposition parties. Because this committee has traditionally worked substantially in a nonpartisan nature, we felt that this was jeopardizing the impartiality of the chairman by having the chair in a decision-making role at a subcommittee meeting. We would like to encourage the party to pass a motion that we increase it to four members.

Also, the membership of the committee has changed because of the membership of the full committee. The motion would be to establish the new subcommittee on communications from the public. I believe everybody has a copy of the motion.

Mr. Charlton moved that a subcommittee be struck to consider on the committee's behalf communications from the public; the subcommittee to be composed of one member from each party and the chairman of the committee—we need nominations from each party—with a quorum of four; substitution shall be permitted on written notice. All communications from the public to the committee shall be referred to the subcommittee, which shall review and respond to them, provided that all decisions by the subcommittee shall be unanimous; any matters which are not decided unanimously by the subcommittee shall be considered by the full committee. The subcommittee shall report to the committee, for consideration by it, any matters which in the subcommittee's opinion warrant the full committee's attention. The subcommittee shall, subject to direction by the committee, determine its procedures.

Motion agreed to.

Madam Chairman: Thank you. Could we have nominations from the various parties as to members?

Mr. Cousens: I would like to nominate Jim Pollock.

Mr. Charlton: I nominate Ed Philip.

Mr. Bossy: I would like to nominate Linda LeBourdais.

Madam Chairman: Thank you. And the chairman. Could we have it moved by Mr. Charlton? All those in favour of the motion to expand?

Motion agreed to.

Madam Chairman: The subcommittee has been very effective. Hopefully we will not have too many complaints against the Ombudsman to deal with in the coming year. We find that has been most effective.

The next thing we have to deal with is not on the agenda, but we do have a case before us that the previous subcommittee dealt with and it has come to our attention again. I think I would like Mr. Bell to deal with this particular case.

Mr. Bell: For the benefit of continuing and new members of the committee, I think a brief background is in order. Prior to January of this year, one of your predecessor committees instructed me to undertake an investigation of a matter brought to the subcommittee's attention by a member of the public, a complainant to the office of the Ombudsman. The complaints were generally in respect of the investigation and report subsequently issued by the Ombudsman. Very simply stated, the Ombudsman did not support the

recommendation of the individual and the individual disagreed with that decision and made his reasons known to the committee. There were some serious allegations made with respect to the Ombudsman and his office's bias and integrity. That is substantially the reason why I was asked to investigate.

I did such an investigation and subsequently reported that to the full subcommittee last January, which in turn made certain decisions on the matter, and then reported those decisions to this committee. This committee accepted and adopted that report at its meeting of January 21, 1988, and by motion instructed the Ombudsman effectively to reopen his investigation.

I might say that that instruction was preceded by the Ombudsman's suggestion that it be done. The committee accepted that suggestion and converted it to an order. In so ordering, the committee stipulated some conditions, or terms, of the reinvestigation that it wanted the Ombudsman and his office to undertake. The Ombudsman did reopen the investigation, and within the last two to three weeks the Ombudsman has reported the results of this further investigation and his conclusions in respect of that investigation to the complainant.

Without getting into any more detail, this report has had some publicity within the last two or three weeks, something that this committee, in my opinion, ought not to involve itself in, at least as of this time. What is necessary now is for the subcommittee, newly constituted, to meet with the Ombudsman with this report to determine whether the terms of the committee's orders had been complied with.

There were specific individuals referenced who needed to be interviewed. There were specific matters directed as for the taking of legal opinion. For example, what I propose is that the committee as a whole confirm the intent of the subcommittee or direct the subcommittee to meet with the Ombudsman and members of his staff as quickly as possible for the purpose of determining whether these terms have been fulfilled, and then to report back here with a recommendation whether anything further should be done, either by the subcommittee or by the committee as a whole.

I would caution you now not to engage in any particulars of the matter. I have obtained, with the concurrence, consent and direction of the complainant, a copy of the report, which has been anonymized, through the office of the Ombudsman. I have copies available for members of the subcommittee, and at the appropriate time I would propose that the subcommittee review this in some detail with the Ombudsman against those expected terms.

I hear in my right ear that we need a motion.

Mr. Charlton: So moved.

Mr. Bell: There is one difficulty. Dr. Hill is not in town now.

Mrs. Meslin: He will not be back until December 1.

Mr. Bell: December 1. I think what needs to be done is the subcommittee should discuss this with you and appropriate members of your staff at first opportunity, and then any decision can be made whether to have further discussions with Dr. Hill when he returns, at least to get the process started.

1030

Madam Chairman: Yes, because I do not think it should wait for too long.

Mr. Bossy: Based on the information Mr. Bell has provided, I would like to move then that the subcommittee be instructed to meet with the Ombudsman as quickly as possible and proceed according to the recommendation.

Madam Chairman: We have that moved by Mr. Charlton.

Motion agreed to.

Madam Chairman: The subcommittee will meet, we are hoping, next Wednesday prior to the regular meeting time, as Mr. Philip is not available after the meeting today. Mr. Pollock, would that be acceptable?

Mr. Pollock: That is fine.

Madam Chairman: Thank you. I think we should make it nine o'clock as it may take some time.

CASE OF MR. O

Madam Chairman: The next item on the agenda is the update on the case of Mr. O and the Ministry of Government Services regarding the Public Service Superannuation Board. This is a case the committee dealt with and made a recommendation on. The Ombudsman's office has some new information to provide to the committee. Mrs. Meslin.

Mrs. Meslin: I will ask Michael Zacks to give a report on this.

Mr. Zacks: The review of Mr. O. The new information is a letter from Mr. O to the clerk expressing his concern and anxiety that the matter has not yet been resolved. The Ombudsman's position is that it is essentially out of his hands at this point.

Mr. Bell: Sorry. Before you begin, members of the committee, I think that in the material that has been distributed to members of the committee there is a letter dated October 14 with an attachment. The letter is the communication Mr. Zacks is referring to. You can see the expression of his, I guess, concern.

Mr. Zacks: The Public Service Superannuation Board has taken the position that it cannot implement the committee's recommendation, because it lacks statutory authority to do so. The Ministry of Government Services has essentially referred the matter back to the superannuation board for action. Accordingly, it is back in your hands. It seems the main problem is that there is no authority to implement the committee's first recommendation. I see in the excerpt from the committee's 16th report there is a further recommendation, "That the committee delay further action on the case until amendments to the Public Service Superannuation Act are introduced in the House," so essentially the complainant is waiting for action to be taken.

Madam Chairman: Just to refresh my memory, Mr. Zacks, did we deal with this as early as last February or March, and we had the ministry come before us?

Mr. Zacks: Yes.

Madam Chairman: It was that recent that the committee made the decision not to proceed with it until legislative initiatives had been undertaken?

Mr. Zacks: That is correct. It is in your 16th report, of June 1988.

Madam Chairman: It is our most recent report.

Mr. Zacks: Yes. It is a recognition that there is no legal authority, which is the position that the superannuation board took, to implement the recommendation that the complainant be paid a sum of money.

Mr. Bell: The last paragraph in the excerpt from your 16th report speaks of a discussion with Management Board of Cabinet to see what can be done to expedite it. It is a long-overdue settlement of the dispute. In view of the committee's recommendation or decision, if you will, as referenced in this report, I am not sure you want to revisit the question of the original recommendation, because frankly I am not sure that anything further you can do is going to resolve the impasse.

What you might consider, though, is maybe to reinitiate any discussion with Management Board of Cabinet and do what can be done to push forward the amendments to the Public Service Superannuation Act.

Mr. Zacks: I could suggest that there is a technique available that I have discussed in the past with the legal counsel to the Ministry of Treasury and Economics as a way of effecting payment for an individual where there is no statutory authority. That is to simply indicate in the agency's budget, as an estimate line, that payment be approved by the Legislature for a sum of money indicated therein for a particular purpose. That would be legal authority to pay.

Madam Chairman: Why has the committee not initiated this before—encouraged this kind of resolution of this matter?

Mr. Zacks: I do not know. I guess it was not suggested in the past.

Madam Chairman: It was not suggested? I recollect that—unfortunately neither the clerk nor I have the correspondence here—I did contact the Management Board of Cabinet about this case back when we made the resolution. I have received a reply from them. It was not an encouraging one, as I recollect, in terms of the initiatives that would be undertaken, but I do not have it with us here today. I think we are going to have to find it.

So there has been a contact made with the Management Board of Cabinet, as directed under our report. Is there any discussion from the committee on this? There are a few people who are familiar with this.

Mr. Philip: I wonder if Mr. Zacks would run by his latest proposal just one more time. I apologize. I was speaking at a convention downtown, so I am late.

Mr. Zacks: The underlying problem is that there has to be some legal authority for the government to make a payment. It either has to be in statute or through some convention or some recognized authority. Recommendations where there is no legal authority, in which it is suggested there be payment, are

interpreted by the government as ex gratia payments. That has been discussed in the past by this committee. The government's position is that there is no legal authority to make an ex gratia payment.

Some time ago I was trying to come up with some device to effect Ombudsman's recommendations where there is no legal authority. I discussed this with Mr. Stoodley, who is director of legal services at the Ministry of Treasury and Economics. I asked him whether or not, if an agency's budget included a specific payment directed to a complainant for purposes of implementing an Ombudsman's recommendation, and that budget were approved through the normal budgetary process, that would be legal authority. The response was that it would be and the government could make a payment based on that budgetary item.

Mr. Philip: So that involved a separate line in the estimates?

Mr. Zacks: Yes. The difficulty with that is, of course, there is a great time delay.

But in this case, there is an even greater time delay in the normal course because there is no authority. The only recourse is to wait for a general amendment to legislation or, as has been suggested on occasion in the distant past, that a special bill be passed, which is highly impractical for a specific individual. But this seems to be a device that would work.

Mr. Philip: There are two matters that we are dealing with. One is, as I think I have indicated before, we have to deal with this in our annual report—a recommendation that would allow the Treasury or Management Board—I mean the Treasurer or Management Board, which is our treasury, I guess—to make ex gratia payments on the recommendation of the Ombudsman. I think we have to make sure that goes into our report.

But what Mr. Zacks is suggesting also is that it would be possible for us to pass a motion here asking the chairman to advise Management Board that we are requesting that a special item be included in the next set of estimates to cover this particular item and that, assuming the estimates are passed and I have not seen any that have not been passed so far, some time down the line in the 1989 set of estimates, this particular person would receive his compensation.

1040

Mr. Bell: May I suggest there is a very good reason why this discussion is still under way and that we are talking about sometimes almost fictions to effect the payment? That is that your report, your 15th report and that recommendation specifically, has not been debated by the House nor has it been adopted.

You know the way it unfolds. Historically, when the House does debate and does adopt a recommendation, all of a sudden the discussion about legal authority or lack of legal authority stops. Whether they find it in their budget or whether they find it in something, it is paid. There have been many examples where ministries or governmental organizations have made a money payment pursuant to a recommendation after the House has adopted it.

I think the practical suggestion on how it may be done is useful, but I do not think realistically that anything is going to happen unless and until this particular recommendation is considered for adoption. If it is not

adopted, then, as with the very few other recommendations which have not been adopted, I think the game is over, frankly. If it is adopted, then I would predict you are not going to hear this type of response. Maybe this next report should again say and do something which is hopefully going to bring these as yet undebated reports forward to be debated and voted upon en bloc.

Mr. Philip: The political reality is that the House is backed up at the moment. We have two very controversial bills which are going to take an awfully long time. I pointed out in the House yesterday that our 13th report, after three or four years, is still not being debated in the House even though people's lives are at stake. I think it is probably one of the most important reports this committee has ever turned out.

The political reality is that we are not likely to get these reports done very soon, certainly not before Christmas. I think it is still worth while, in the interim, for the committee to advise the chairman to request of Management Board— Indeed, I will raise it in the minister's estimates. Management Board estimates are scheduled before Christmas in the House and I will raise it also with the minister at that time.

In the meantime, I would propose—do you want a motion, Madam Chairman?—that the committee request the— Should it go from the clerk or from the chairman?

Clerk of the Committee: Whichever you choose.

Mr. Philip: Okay, let's make it from the committee, then; that the clerk advise the chairman of Management Board, Mr. Elston, that it is the request of this committee that the 1989 set of estimates contain an allocation of moneys for the payment under the Public Service Superannuation Act— We do not even need to mention that; just this particular item and then describe it. Leave the wording up to the clerk.

Mr. Bossy: That makes me a bit nervous. I would imagine that Management Board looking at that type of motion coming from this committee is going to be somewhat wary in accepting a recommendation on an item we can really not put a figure on. I know we are trying to put a line somewhere into the budgetary estimate. Do we have what has been paid ex gratia?

Mrs. Meslin: We have the figure.

Mr. Bossy: We do have?

Mrs. Meslin: It is only the figure that has been requested. It is \$2,239.91 plus—

Mr. Bossy: For this case. We are talking about this case.

Mrs. Meslin: Only this case.

Mr. Bossy: What we are looking at is establishing a precedent, or whatever, that this is going to be a fund, or am I wrong in assuming that?

Mr. Philip: No. In our report, we are making a recommendation that there be a general process in the Management Board of Cabinet Act or in the Ministry of Treasury and Economics Act—

Mr. Zacks: In the Ombudsman Act.

Mr. Philip: Okay, in the Ombudsman Act, that would allow for payment by the Treasurer or by Management Board--

Mr. Zacks: Or any ministry.

Mr. Philip: Or by any ministry for the payment of ex gratia payments on the recommendation of the standing committee on the Ombudsman. That allows us to get away from this problem of their saying, "We really want to implement your recommendations, but we have no way of doing that." But that is further down the line. That has to be dealt with when eventually our report gets dealt with in the House.

All we are saying is that because that may take some time, in the interim a way of handling it in a legal way would be for him to simply contain a particular item for the \$2,200 plus interest in his next estimates.

We are not doing anything that we have not already agreed on. We have agreed that this guy should be paid. All we are suggesting to Management Board is that there is a method of him paying it, and we are asking that he do it this way, which will in fact allow him the authority to do it.

It only solves this one problem. It does not deal with our general recommendation, but our general recommendation or the report may not be dealt with for a year. We do not know. We hope it will be. Until such time then, at least get this guy off our agenda.

Madam Chairman: The only change that has been made is that twice the committee has met and decided in its 15th and 16th reports that although it supports Mr. O, it has said that it would wait for legislative initiatives rather than seeking out a course that might be the solution.

Mr. Bossy: Do we have any records as to how many times in the last while, when a recommendation has gone from this committee for ex gratia payments, the moneys have been found somewhere to meet that recommendation?

Ms. Meslin: We have not looked at numbers, but it has been done in the past.

Mr. Bossy: I recall that we were involved in one of those with a trust company, I believe, a scam that took place, and there was a recommendation made at that time.

Ms. Meslin: Yes.

Mr. Bossy: We do not seem to get feedback as to whether this flows or not. I guess the problems get resolved, but the members of the committee do not always hear about it.

Madam Chairman: One more question, because I remember the discussion that ensued from this being before the committee before. Have you suggested this method to Management Board or to the Public Service Superannuation Board as a means for them to be able to carry out the recommendations of the committee?

Mr. Zacks: No.

Madam Chairman: Why have you not?

Mr. Zacks: For good or bad reasons, from our point of view it appears that the Ombudsman's role has essentially stopped in this process and it is now a matter between the committee and the government. Through your support of the Ombudsman's original recommendation and your carrying on with the matter, it appears that our role is simply to get information, to deal with the complainant on occasion and to advise. The Ombudsman's authority to act is gone, it has been exhausted, and we really have no official role in this.

We have not been asked by the board to suggest anything. The reason I raise it here is because I am here and it is something we have raised with other ministries or agencies in other cases where it was considered appropriate.

If I could offer a suggestion to the committee, as a way of trying to obtain compensation for this complainant, just to follow up on what Mr. Bell said, he is quite correct. There have been any number of cases, which one would objectively look at as an ex gratia situation, where the money has for some reason materialized to pay the complainant, either at the committee or afterwards.

I remember in the North Pickering matter, a substantial amount of money was paid to complainants. I have looked high and low for legal authority for that payment to be made, yet it was made, in the neighbourhood of \$1 million; and in other situations money has been paid. It really depends, I think, more so on how technical and legalistic a particular agency is when it is dealing with a request for payment of money and also perhaps the political concerns that are at stake. There is no real pattern that I can suggest as to when money is paid and when money is not paid.

1050

When the committee's report is debated and, hopefully, supported in the Legislature, most likely, as Mr. Bell indicated, money will be found to pay. What I have put forward is a suggestion that you may wish to consider to act upon at this time.

Mr. Philip: In fairness, though, to Management Board, it may be afraid of its being pointed out by the Provincial Auditor. Being Management Board, they are more vulnerable to a criticism that they have made payments without authority than any other ministry and so they may not be acting just in a bureaucratic way. They may simply be looking for a way—what we are talking about is a small amount of money, but with compounding interest, and the longer this goes on the more they are going to have to pay out.

Plus, I am sure that this small amount of money is just a pain in the butt to them. It is something that is dragging on that they would rather get rid of. If we can show them a way out in which they are not going to be open to some criticism from the Provincial Auditor—not that Doug Archer would find this to be terribly exciting; there is very little money at stake—it gets them off the hook and they can feel comfortable that they are not going to be open to criticism.

The longer this goes on, it is costing the taxpayers more than the compounding interest. It is costing the taxpayers all the bureaucracy of having this committee, the Ombudsman and everybody else dealing with what amounts to a very small amount for a very long period of time. By the time you add up all that, probably the biggest expense is handling the stuff, not the actual money they are going to pay out and get rid of.

Mr. Chairman: Any further discussion on this before we vote on the motion?

Mr. Pollock: Being part of the committee, I had recommended that this chap be paid. I do not think we have any other choice but to forge ahead and try to see that he gets his money.

Madam Chairman: The only distinction is that, because I guess I was in on the discussion the last time, indeed the committee has supported the Ombudsman's recommendation and affirmed that. The committee has addressed the problem of how to implement it twice. Twice they have said the way to implement it is by debating the report in the House and making legislative changes or amendments that will allow this payment. Twice we have not used an alternative Mr. Zacks has put forward today. In fact, what has happened is we have said to wait until the legislative amendments are made.

Mr. Philip: We are not really disagreeing, though. The essential thrust of our recommendation before was that this is an ongoing problem, let's solve the problem. All we are saying now is that it appears as though that ongoing problem may not be solved quite as soon as we had hoped and therefore let's get this one off the ledger. They are complementary.

Madam Chairman: That is a fair estimate. Any further discussion on the motion? Would you like the motion read again?

Clerk of the Committee: Basically, the motion is that the clerk advise the Chairman of Management Board in its request that it makes a request that the committee notify the chairman that he include in the budget a line in the estimates for the sum of X number of dollars to be paid.

Mr. Philip: The 1989 estimates.

Clerk of the Committee: The 1989 estimates.

Mr. Chairman: Is that sufficient? All those in favour of the motion?

Motion agreed to.

Mr. Philip: It might be useful to note that being the Ombudsman's committee, it is probably assumed that it is unanimous, but it might be useful to use the word "unanimous" in the letter to Management Board. It emphasizes that it was a complete consensus with no dissenting votes.

CASES OF MR. B AND MS. D

Mr. Chairman: The next item on the agenda is item 5, which is the update on cases of Mr. B and Ms. D. These are involving the Criminal Injuries Compensation Board and cases that were dealt with last February by the committee and recommendations were made.

Mr. Bell: I just had the clerk distribute some additional material that was not with the package that was sent to you with the agenda. One of the letters in that additional package is from Dr. Hill to yourself, dated October 25, 1988, reporting on the status of the Mr. B and Mr. D matter. Mr. Zacks, forgive me. I am going to do a little summarizing, and then you can jump in whenever you want.

Mr. Zacks: Sure.

Mr. Bell: It is a progress report and it is an expression of a concern vis-à-vis the settling, if you will, of the legal fees of legal counsel that Dr. Hill arranged for the two complainants in respect of what has to be done. This is the case, remember, where you recommended that the board in each of the cases consent to a judgement of the divisional court, setting aside the original board's decision and referring it back for a rehearing.

There seems to be an issue vis-à-vis the payment of accounts and Dr. Hill has expressed some concern. Rather than deal with this piecemeal, what I would prefer is to wait until the lawyer in question who is going to represent these people and will be proceeding, presumably quickly on the consent applications to set aside those two decisions, and thereafter there will be, I guess, two hearings scheduled by the board. Is that correct?

Mr. Zacks: That is hopefully the scenario that will occur.

Mr. Bell: What I would like to do, rather than get into the issue of whether the positions taken on legal fees are reasonable or prejudicial to the process now, I would sooner wait until Dr. Hill reports back on the result of the entire process. It may well be in the interim that agreement is reached between the parties as to the extent of the legal fee to be paid, presumably, by the Attorney General's ministry or the board out of its own budget, whatever is the situation, because I think it is preferable that the process be completed without some discussion on that issue at this stage.

Mr. Zacks: The process is going ahead. At this point, legal fees have been agreed to. What Dr. Hill was raising in his letters concerned the future cases where the committee feels it is appropriate to recommend a similar course of action that some consideration be given to a mechanism to ensure that lengthy and protracted discussions between the Attorney General (Mr. Scott) and counsel for the complainants, that some process be implemented to ensure that legal fees do not become a main subject of discussion and that the actual matter can go ahead quickly.

Mr. Bell: They are always at the forefront of my discussions, but, in any event, I think the point is well made, and my preference is to defer that discussion until we see this process.

Mr. Zacks: We have no objection to that.

Mr. Bell: This is a letter for information which the committee and those who are preparing your draft 17th report may or may not include. My preference is not to report it in any real detail at this time.

Madam Chairman: Are there any comments from the committee? Is that a reasonable suggestion? Is anybody opposed to leaving this until Dr. Hill reports back on the results of these cases? I am pleased to see that they are moving along and that we were able to find a method to have them reheard. I think that is a successful outcome of our committee's recommendations.

1100

CASE OF MRS. J

Madam Chairman: The next item is Mrs. J, provision of semen. I have seen your documentation, as well. It is an interesting case that the committee reviewed and made a recommendation on.

Mr. Bell: In the package of material that is with the agenda, there is a letter from Dr. Hill to Cindy Nicholas dated October 4 which provides some additional information. Tell me, have you closed your file?

Mrs. Meslin: We have closed our file, but in relation to the case we are having ongoing discussions with the ministry as new information comes out. The complainants are aware that the ministry has agreed that when there is safe semen they will be among the first to receive it.

Mr. Bell: There is nothing for the committee to do other than to note the information you passed on.

Mrs. Meslin: That is right.

Madam Chairman: Except, as I recollect, we made recommendations and you were told to report back to us the outcome of those recommendations.

Mr. Bell: As and when they are implemented. It is a waiting pattern now. Is the waiting period acceptable to the complainants? They understand and appreciate—

Mrs. Meslin: Yes, they do.

Mr. Bell: All right. So we do not have a problem.

Mrs. Meslin: No, we do not.

Mr. Henderson: You said that as soon as safe semen is available, they have been assured they will receive it. I forget the details now, but have they not gone ahead anyway and was it not a question of getting them money?

Mr. Bell: No. They waited.

The committee can note this progress towards implementation in its report, certainly.

Mr. Philip: Is it the Ombudsman's intention to do a follow-up in 1989 or is it simply thrown into the lap of Mr. and Mrs. J with the understanding that they will report back if they do not get the semen?

Mrs. Meslin: No. We have spoken with the ministry and we intend to continue these discussions and follow it up. As a result of the committee's instructions to both the ministry and the Ombudsman to meet, with the co-operation of Dr. Barkin we have established an ongoing committee now with that ministry to discuss this case and its progress as well as others as they come up.

Mr. Henderson: As I recall, and somebody correct me if I am wrong, the issue was whether the semen that this couple can obtain—it is not difficult to obtain—was going to be billable to the Ontario health insurance plan or whether in some other way they would be compensated for it.

The ministry feels there needs to be new guidelines and new standards of safety and so on, and that is fine; that is its job. But semen has been available for a couple of decades and it seems to me this couple has made it clear they want it. The question they are putting to us is not a question about safety and standards and new standards and new arrangements, but simply whether when they get it they can get some help from the medical insurer.

We debated all that and said yes, they should. Then the ministry said, "But wait a second, there is a whole lot of things we have to talk about having to do with standards." Incidentally, they brought that up, as I recall, after we had made our recommendation.

It seems to me we are setting a precedent we ought to know about if we are allowing our recommendation to be put aside in favour of the ministry's wish to develop new standards for safety in the province-wide delivery of semen. That is a different issue than the issue that was brought to us in the first place and that we made a decision about.

Madam Chairman: Your recollection of events is correct except with regard to the committee's recommendation, because the Ombudsman and the Ministry of Health did go away and discuss this matter and came forward with a solution. The end result was that we did want Mrs. J to be provided with semen and to be covered by some insurance costs, not at her own expense. There was an agreement, and the committee agreed with the agreement and recommended that the agreement between the ministry and the Ombudsman be implemented.

It said that when the Ministry of Health locates a safe process for donor sperm, it will provide this to Mrs. J and the ministry will pay for it. Also, the Ombudsman would report back. Third was that this committee be established between high-level individuals at the Ministry of Health and the Ombudsman to have more ongoing discussion about cases that the Ombudsman is currently reviewing.

In fact, although our discussions did evolve along the way you indicated, Dr. Henderson, our actual recommendation provided for waiting for them to locate safe sperm that they felt would be within their standard to provide to Mrs. J. We did make the recommendation that they should press ahead immediately.

Mr. Henderson: Now that you jog my memory, it was the Ombudsman's recommendation I was thinking of. For the record, my concern still stands. We are really allowing a ministry's very appropriate concern with province-wide safety standards to complicate the request of a particular couple for a particular kind of service that they, by their behaviour, have indicated they want now and that is indeed available. As I said before, semen has been available for at least a couple of decades, and it is not by any means a new procedure.

I guess if the couple are saying this is okay, I suppose it is not—maybe it is or is not for us to say it is not okay. Again, I think we are setting a precedent in not really making a decision about the Ombudsman's recommendation. I am a little concerned that the couple realize that "as soon as it becomes available in a way that the ministry considers to meet its new standards" could be a process of years, I suspect. Knowing the way bureaucracy unfolds and knowing that many people do not understand the way bureaucracy unfolds, I am a little concerned that justice delayed is justice denied in this case and that time may be getting on for this couple.

Madam Chairman: I think the basis of this case, which you have indeed highlighted, was that there had been discussion before the case came before the committee. This new information would not have been admitted, and that is a problem the committee has always had—ministries coming before us and giving new information that has not been previously disclosed to the Ombudsman. Had it been, they might have made a different recommendation. I think that the committee that has been established between the ministry and the Ombudsman is going to help iron out a few of those problems.

Mrs. LeBourdais: Just by way of follow-up to Mr. Henderson's comment, I agree with his position, although the very reason why this couple is coming and asking for the semen is because of the inherent medical problems. I gather, if my memory serves me correctly, it had already resulted in problems with their first child; so if they come to us and we provide them with inferior semen that could provide a whole other range of difficulties—acquired immune deficiency syndrome being, I guess, the key one we have been noting—they have not gained anything.

As I remember, this was a young couple and not an older couple. I think what is sad in all this is that the amount of money requested was very small. They could have, at this point, had adoption procedures in place and probably have had a child of two by now, which I think is in a sense the sad part of this story, but perhaps not for us to comment on. I am just wondering, did Dr. Barkin or any of the other Health ministry people give you any indication of time? If they did, should this time factor be conveyed to this couple, so that if they still wish to extend their family, they have some other alternatives to look at?

1110

Mrs. Meslin: In the discussions, although the ministry certainly could not give any assurances, it was hopeful that within the next six months it would certainly know whether it would have a process for safe semen. We communicated that to the couple.

Mrs. LeBourdais: So at this point they are saying that there is no specific guaranteed testing of semen for acquired immune deficiency syndrome?

Mrs. Meslin: They are saying that although there may be testing, they are still not sure that they agree with that process, that the process is as safe as they would like to see it.

Mrs. LeBourdais: That would essentially be the key element they are testing for, rather than some other genetic kind of disease?

Mrs. Meslin: Yes.

Mrs. LeBourdais: So to some degree, they still take a chance that there might genetically be some other factor within the semen that could produce an imperfect child?

Mrs. Meslin: Yes, I guess so.

Madam Chairman: Will you be following up with that? I think Mr. Henderson's concerns were warranted in that this may go on for a year, two years or three years. Are you satisfied that six months is a reasonable length of time to wait? Are you going to make some contact again with the ministry at six months to ensure that this recommendation is not delayed any longer?

Mrs. Meslin: I am hopeful, with the establishment of the Ministry of Health and the standing committee on the Ombudsman now, since we will be meeting every couple of months, that that will be raised peripherally, in any event, each time. So I feel we are going to be able to follow it up very closely.

Mr. Henderson: I will make one more brief statement and then I will let the matter rest.

My hunch is that the ministry is not wanting to get into the business of funding people to provide semen, but rather to get into the business of providing semen itself. That basically is a political, administrative and I suppose bureaucratic decision. They are entitled to make it if they think it is the right one.

I would just be concerned that the needs of this couple not get too caught up in that basically administrative decision, especially given the Ombudsman's original recommendation.

Madam Chairman: Your concern is noted. I hope we will hear back from you again on this policy decision because I think it was really a landmark case for us.

Interjections.

Madam Chairman: We will not comment on that because I think we explored with the gentlemen on the committee last time the alternatives that were open to us.

CASE OF COMPANY S

Madam Chairman: Our next agenda item is an update on the case of company S. I do not know if we can proceed with this without Mr. McLean. What do you think, Mr. Pollock? Company S is a favourite—

Mr. Pollock: This was Al's pet beef.

Madam Chairman: That is right, yes. You will report to him?

Mr. Pollock: I certainly can report to him.

Madam Chairman: Be sure to tell him that we are dealing with this today and he missed the highlight of his existence. He always held back all his concern about this one.

Mr. Bell: It looks like the ball is in the other court now.

Madam Chairman: You have a letter before you dated August 25, and a page attached which is September 23. Our concern was that the ministry was to contact the complainant and suggest three arbitrators to deal with this case. No response had been heard from the complainant for a number of months. We even made a recommendation that the ministry again make contact and ensure that there had not been a miscommunication because we knew how anxious the complainant was to press ahead with this matter.

The complainant has written back to the solicitor, and assured us that they are proceeding with this matter, that they are aware of the arbitrator alternatives and that they have been in contact with the ministry. So it is just to know that although it has been delayed, it perhaps has not been the ministry's fault in this particular instance, although we cannot necessarily—that was the case in the last year or year and a half.

OMBUDSMAN'S RECOMMENDATION DENIED

Madam Chairman: Number 8 is the home owners' complaints against the Ministry of Consumer and Commercial Relations.

Mr. Bell: In that additional package of material which the clerk just distributed to you there is a brief letter from Dr. Hill to the chairman dated November 8 indicating some progress towards the implementation of this matter. One of the complainants is no longer interested and does not want the Ombudsman to do anything. Does that leave Mr. and Mrs. S as the only remaining complainants to have their claim addressed, Mr. Zacks?

Mr. Zacks: It is my understanding that there were three outstanding matters, and the dropping out of one of the complainants makes it two. I have not been able to get hold of the official in the ministry to follow up on this, but from the tenor of the correspondence, it seems to be close to resolution.

Mr. Bell: May I suggest this, Mr. Zacks? Perhaps for next week or, at the latest, the following Wednesday when the committee meets, could you contact the appropriate individual at the ministry and give us a current progress report in the hope the committee can finally close that one off?

Mr. Zacks: Yes, I will do that.

Mr. Philip: I believe this was one dealt with when I had to be on the standing committee on administration of justice and the committee was having hearings. Are these the Housing and Urban Development Association of Canada home warranty program problems again?

Mrs. Meslin: Yes. These are still the same ones.

Mr. Philip: Still. My feeling is that a number of people withdraw their complaints about the HUDAC home warranty program simply because they can no longer go on with having their house in a state of disrepair, if you will. They eventually just give up and say: "I'm going to pay that extra \$10,000 or \$20,000 and get the thing repaired myself. I give up, because I don't want any more hassles." Did Mr. B give any reason for withdrawing the complaint?

Mr. Zacks: I do not know. I do not have the information in front of me. Ms. Morrison, who is dealing with this, was not available today. I do not have it in my information, but I could find out for you.

Ms. Meslin: Perhaps we can put it all together in our report for next week on this issue.

Mr. Philip: I think it would be useful. I think it would be useful for the Ombudsman at some point to look at how complaints may be withdrawn from the HUDAC home warranty program. My feeling has been that a number of people in this and also in private disputes with individual contractors just get worn down by the system, throw up their hands and say: "It isn't worth the hassle. I am going to pay that extra money and deal with it myself."

I have not had the experience of dealing with HUDAC since Mr. Rose took over—and I recognize he is trying to improve things—mainly because there are not very many new projects going in my riding as there were in years gone by. My feeling then was that people were just giving up. They were tired of me writing 15 times to the program and so forth. It would be useful to see whether people are still throwing up their hands and saying, "I can't do without my basement any longer, so I got a private contractor in and I'm just going to have to pay for it over the next 10 years."

Mr. Zacks: We will report back on this.

ORGANIZATION

Madam Chairman: The next item on the agenda is the committee's draft 17th report. Given the time and given that we have dealt with a lot of organizational matters which unfortunately many committee members who are here today were not involved in—but we appreciate your patience—I think it would be best if people look at the 17th report, which Jennifer Wilson has drafted, and be prepared to discuss that in camera next week when we meet. Given that it reviews our whole year of what we have done, people should—I know you have just had it on your desk perhaps since Monday—have an opportunity to review it and to come prepared to make any comments or amendments that you feel are necessary to truly reflect what recommendations the committee made. Are there any problems with that? Can everybody ensure that they have received a copy of the draft? It is not too long. Hopefully, you will have a chance to review it before next Wednesday's meeting.

1120

I was going to make the same recommendation with respect to item 10, which is dealing with the expansion of jurisdiction. The committee held public hearings on this issue. There are some members who were here throughout all of those deliberations. Jennifer Wilson has prepared a summary of some of the presentations that were made before us. I think we need the opportunity to really sit and brainstorm and discuss what we heard. We have not really had an opportunity to come back as a committee, discuss what we heard over the summer and what happened as a result of our meetings with the Ombudsman in Fredericton and Winnipeg. Those are the two items that I suggest we come back and be ready to discuss next week. We would appreciate any comments.

Mr. Philip: I realize that this is not within your jurisdiction, but it might be within the general jurisdiction of some of the members of the committee that are new. That is, with no disrespect to any of the new members, I think it would be helpful if we could have substituted for the extended jurisdiction some of the people that were on the original committee that had had the hearings, because I know that I would find it very difficult as a new member to get not just the content, but also the spirit and the enthusiasm, if you want, of some of the presentations, if I had not been physically on it. If it is at all possible to get people like Walt Elliot and some of the other people that served on the committee to come in as substitutes for the new people that are on the committee, I think that it makes more sense than having people here faced with doing a report.

It will have major implications for the next 10 or 15 years without having had the experience of meeting with the people in other jurisdictions and talking with them. It just will not be adequately covered; no matter how good our research material is, you cannot express emotion and other things like that in a committee report in the same way as in a research report.

Madam Chairman: Mr. Philip, your suggestions have been noted. I think some arrangements have already been made from the Liberal caucus. Mr. Pollock, perhaps you might speak with Mr. McLean and see if he is available to attend our meetings when we review these. I think that that is an excellent suggestion.

Mrs. Meslin: I just wanted to indicate to the committee that Dr. Hill is preparing a concluding submission in writing to be given to the committee, for them to see during their deliberations. That draft will be ready next week. Our problem is that Dr. Hill is away until December 1.

Madam Chairman: Okay, so perhaps we will press ahead in any event with the start of our deliberations next week. Then it will be the following week that we will expect Dr. Hill will start our agenda with his concluding remarks. Would that be acceptable? I think we should press ahead with it next week in its preliminary form.

Mrs. Meslin: I am just trying to think if the following week is December 1.

Madam Chairman: Maybe it is not. Maybe it is November 29, now that I—

Mr. Philip: It is November 30.

Madam Chairman: November 30. Well, the following week. But I think that the committee cannot delay any longer, because we have that as one of our main agenda items. I think that if we wait too long our memories and our recollection of the events that occurred will fade. I think it is something that we really want to get to before the end of the year. I think it is important enough not to have it delayed any longer. Are there any further comments from the committee at this point before we go into other business?

Mr. Philip: Do you have an update on how the baby is?

Madam Chairman: The baby is now three and a half pounds and doing fine.

Other business: We are supposed to discuss whether we like this room, the new format and the way it is set up.

Mrs. LeBourdais: With some heat.

Madam Chairman: With some heat, yes. There is not enough heat in here today. I agree with that, but the actual setup, the way the desks— The Legislative Assembly wants to have our input. We deal with such important matters and we would hate to not deal with this one.

Mr. Philip: I think it adds to the nonpartisan nature to have the round table rather than the traditional table. I had been asking for that for a few years and been accused of being an American or a European in trying to subvert the traditional parliamentary adversarial system. I am pleased that somehow, by accident and without any real forethought, we have stumbled into this.

Mr. Bell: Some people might say it resembles the Roman arena. If somebody is particularly difficult, you can always put him in the middle.

Madam Chairman: Certainly, if there are excesses in our witnesses, we could just put them into the middle.

Mr. Bell: Or flood the rink.

Madam Chairman: Any further comments? Any other business? I gather you are in favour of it. We will accept that it is no better or no worse than what we had, or it was definitely better. Mr. Charlton, do you have a comment? You look like you are waiting to say something.

Mr. Charlton moved adjournment of the committee.

The committee adjourned at 11:26 a.m.

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STANDING COMMITTEE ON THE OMBUDSMAN

ORGANIZATION

CASE OF MR. A

CASE OF MRS. H

EXPANSION OF OMBUDSMAN'S JURISDICTION

WEDNESDAY, NOVEMBER 23, 1988



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Bossy, Maurice L. (Chatham-Kent L)
Carrothers, Douglas A. (Oakville South L)
Charlton, Brian A. (Hamilton Mountain NDP)
Cousens, W. Donald (Markham PC)
Henderson, D. James (Etobicoke-Humber L)
LeBourdais, Linda (Etobicoke West L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Also taking part:

Reycraft, Douglas R. (Middlesex L)

Clerk: Carrozza, Franco

Staff:

Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon
Wilson, Jennifer, Research Officer, Legislative Research Service

Witnesses:

From the Office of the Ombudsman:
Morrison, Gail, Director, Investigations
Meslin, Eleanor, Executive Director
Zacks, Michael, General Counsel

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Wednesday, November 23, 1988

The committee met at 10:11 a.m. in room 151.

ORGANIZATION

Madam Chairman: I call the meeting to order. This is the standing committee on the Ombudsman. We are primarily discussing today our 17th annual report and the issue of expanded jurisdiction of the Ombudsman. You have your agendas before you.

If I could just open, first, with a suggestion to the committee, next week we are to meet from 10 to 12 a.m. We have a number of matters to deal with, but many of them will have to go back into writing next week, although we could still hold a meeting.

The Provincial Auditor is handing down his report. There is a lockup for those who are on the standing committee on public accounts, of which I think there are three in our room: Don Cousens, Ed Philip and myself. The lockup will require substitutions for those individuals during the time period that we normally sit.

I have been asked if perhaps we would not sit next Wednesday and reconvene the following Wednesday so that we would not, on very important issues, have substitutions in our committee, if that is acceptable to the committee as a whole. Are there any objections to that?

Mr. Philip: I do not think you should have substitutes when you are writing the report. It just does not make any sense.

Madam Chairman: I think it will allow all the public accounts people to study intensely the Provincial Auditor's report without interference. So we will not meet next week, but we will meet the following week.

Clerk of the Committee: Perhaps you can give them the information that the estimates have been assigned to us.

Madam Chairman: Have they?

Clerk of the Committee: Yes.

Madam Chairman: Oh, good.

Clerk of the Committee: On a motion yesterday.

Madam Chairman: For those who were not in the House when the motion was put forward in the House, we have been assigned the estimates. That is something that we will put on our agenda and hope to deal with during December or January for the Ombudsman, so that the Office of the Ombudsman will be aware of that and prepared to respond.

Mr. Philip: The normal procedure is that estimates be dealt with when the House is sitting. The House is reconvening on January 3, so we might

think of dealing with the estimates some time in that time frame of from January 3 to somewhere in those two or three weeks, whatever the House may be recalled for.

Madam Chairman: The clerk had requested that we be assigned the estimates, so that could be done while the House is sitting because last year, as I recollect, we were not able to get to the estimates until late in the year because we had recessed after Christmas. We will put it on the agenda for one of the weeks in January when the House is sitting.

CASE OF MR. A

Madam Chairman: Number 1 on the agenda is a report from the subcommittee on communications from the public relating to the case of Mr. A. The subcommittee met this morning. We did not have a quorum. We have reviewed the case and we are not prepared to report to the committee as a whole on that particular case yet.

We are through item 1 already. That is great progress.

CASE OF MRS. H

Madam Chairman: Item 2 on the agenda is the update with regard to the case of Mrs. H and the Ministry of Education. We have new correspondence from the Ministry of Education with regard to this case. It is somewhat different than we had anticipated. We are just having that copied for members. They will have a copy of the recent correspondence and response in their hands in a moment, but perhaps Mr. Bell can go over a few of the items relating to this case and the Ombudsman can respond.

Mr. Bell: Members, you will recall that this is the recommendation-denied case that you considered in August, dealing with the issue of entitlement of a widow of a deceased who received superannuation benefits under the Teachers' Superannuation Act. You will recall the issue is that at the time of retirement, the deceased was not married to the person now claiming entitlement. The marriage occurred subsequently.

The Ombudsman, in his subsection 22(3) report, essentially made two classes of recommendations, one recommendation directed to the complainant specifically that she be entitled, on a retroactive basis, to pension benefits on an accepted formula arrangement and that, further, the Teachers' Superannuation Act or any other relevant legislation be amended to provide for such entitlement for all persons in similar circumstances, i.e., those who marry a retired teacher or a person with another position, as the case may be, after retirement in the circumstances where currently no pension benefits are payable.

In fact you, as a committee, after you considered the matter and deliberated on your own, recommended that the Minister of Education (Mr. Ward) cause the Teachers' Superannuation Commission to pay this complainant, Mrs. H, certain survivor benefits as of a date in 1985 and that the minister, within three months of that motion, i.e., on or before November 22, 1988, report to the committee on the advisability of extending this benefit as a matter of right to spouses of teachers' superannuation fund members adversely affected.

Sometime towards the early part or middle of October, I met with representatives of the Ministry of Education at their request. At that time,

they reviewed with me the state of the bidding, if you will, vis-à-vis the committee's recommendation. It was as follows.

They had had discussions with the Teachers' Superannuation Commission and had otherwise addressed the question of whether or under what circumstances Mrs. H could receive these benefits on her own. They reached the conclusion, first of all, that the Teachers' Superannuation Commission was not prepared to make a payment to this individual on any basis, ex gratia or otherwise. The conclusion, therefore, of the ministry was that this person could not receive such benefits without legislation.

1020

They then concluded that to enact legislation dealing with this person specifically would probably raise certain positions or expose that legislation to certain attacks, particularly under the Charter of Rights, section 15 specifically. So the ministry decided to consider an amendment to the appropriate legislation, the Teachers' Superannuation Act, which would deal with all persons of similar circumstances to this Mrs. H, again on a retroactive basis with a specific cutoff date.

The information I received as of October 12 was that the legislation had passed through all the necessary channels within the Ministry of Education and it was then to be submitted to the cabinet process. I am sure you are familiar with the details of that process better than I, the cabinet committee on legislation, etc. In all frankness, the ministry officials with whom I met did not express full optimism that the legislation would be favourably received or even approved by that process. They promised to report to the chairman before November 22.

I believe members of the committee now have a copy of a letter dated November 18 from the Minister of Education to the chairman of this committee, Cindy Nicholas. You will see at the bottom of the first page the minister indicates that he has no authority to direct or cause the Teachers' Superannuation Commission to make payment when there is no legislative authority for so doing. "The commission is governed by the...act and it has no authority to go beyond its bounds." That is essentially what I told you. The commission would not make a payment without some specific legislative authority and the minister could not cause them to do so without such authority.

You will note Mr. Ward's letter, on the second page, top paragraph, now speaks of the government's view, not the minister's or the ministry's view. "The proper place to resolve the issue is the pension working group...composed of representatives of this ministry, the Treasury and the Ontario Teachers' Federation." It "has been set up to review various pension policy issues and benefit options available under the Teachers' Superannuation Act," the issues to be included on the agenda for the work group. Therefore, no further action on this issue is going to be taken.

As I recall, that is the very same position that the deputy minister set forth to the Ombudsman in the response to his subsection 22(3) report; not in the same language, but he recognized that the legislation needed to be addressed on that issue and thought the proper way to address it was through the pension review process that was in place. I presume what Mr. Ward describes in that paragraph is that pension review process.

If I am correct in that, we are right back where we started with this

case, and I suggest it would be appropriate for you to discuss the matter not only with the representatives of the ministry but probably the Teachers' Superannuation Commission. I think I noticed within the last two or three minutes somebody come into the room who I believe did appear before you on behalf of the commission. He may be available today to give any explanation from that perspective, although I think a discussion would be more meaningful with everyone concerned.

You are in this situation, I venture to say, members: It is a recommendation of yours which has not been implemented. There is no express statement that it will not be implemented, but it sure is not going to be implemented now. Again, not to repeat myself, I think the process would be better served if this recommendation, along with the others which are still waiting, be debated in the House in the appropriate way to see what the decision of the House is on a vote. If the vote is to support the recommendation, I think your discussions may be more meaningful or fruitful with those concerned. If it is in the current status of a recommendation made but not yet debated in the House, without any indication of when it will be, those discussions will probably not be as meaningful or fruitful.

Mr. Pollock: I have no problem going along with what they have recommended, of these particular user or interest groups having a say. My main question is when. Is this going to drag on for months or years or are they going to sit down, discuss the issue and come up with a decision? I guess that is my main question.

Mr. Bell: I do not have the answer to that. I do not know whether anybody in the room does. I can tell you that in my discussions with the ministry representatives, when they indicated they did not think the proposal for this legislative change would be favourably received by this cabinet committee, I think the main reason was one of timing. There is a concern held by those who are party to the process that to deal with this pension issue before this group gets under way to deal with all the relevant pension issues will somehow adversely affect the process. I do not understand that, although I do understand that is their point of view.

If somebody in the room can help us as to the timing of this legislative review, we would be assisted.

Mr. Pollock: I suppose it is not within the powers of this committee to recommend any particular time. That would be actually jumping the issue a little.

Madam Chairman: As I recollect, our recommendation was that Mrs. H in particular be paid, not total, across-the-board legislative changes; that they consider that but that she be paid. That was the direct recommendation by the Ombudsman and that was not dealt with.

Ms. Morrison: I was just going to say that. The committee at the time was very concerned that this particular complainant be dealt with and therefore it made the recommendation in the terms it did.

We had recommended a slightly different recommendation, which the committee may now wish to go back and reconsider. Given the response it has had from the ministry saying it cannot do this—although our information has been that it might be able to do this—the committee may wish to go back and look at its recommendation again and look at the recommendations which were in our original report, which were that an ex gratia payment be made to Mrs. H and then that the rest of the policy be looked at.

My understanding is that last week at the committee, there was some discussion of manners in which a budget can be set for making such ex gratia payments. We do not see any legislative or other impediment to a recommendation which would provide an ex gratia payment to this particular complainant and then provide that the legislative review could be implemented.

Perhaps rather than waiting to go to the full Legislature with a recommendation which the ministry maintains it cannot implement, the committee should consider making a recommendation which could be implemented for Mrs. H, and then the legislative review will unfold as it should.

1030

Mr. Philip: I am tending to agree with what Ms. Morrison has said. It seems to me that we have a couple of problems here. One is that I have no objection to that committee reviewing the general problem. I think that could be a recommendation that we accept, that there is a problem here and that that subcommittee, consisting of representatives of the teachers' superannuation pension fund, the government and the Treasury, review that.

But what we are dealing with is an individual problem. When you are dealing with pensions you are also dealing with the time problem. The longer it goes on, of course, the more it is going to cost somebody, be it the superannuation pension fund or the government, if it is an ex gratia payment.

I also have the problem, then, with sending a matter involving a specific person, rather than a general issue, to a body like this because a body like this is to deal with issues. The case may serve to highlight the problem of an issue, but it should be the policy that is dealt with by a body like this, rather than the merits of an individual case.

I am also concerned about the delays. We have had the commission on pensions tabled, I forget how long ago. The government has been sitting on that. That deals with such a fundamental issue that one would think that the government would have moved on it, namely, whether or not individual employees and/or their representatives should have some input into how moneys are invested in their own pension plan.

Yet the government has failed to move at all in that. It is gaining dust on the shelves. So one would think that you are probably talking about several years in implementing anything as complicated as this. The working group has not even sat down yet as far as I know. At least, that is the implication of Mr. Ward's letter.

If we assume that it will sit probably in 1989, chances are it will bring in the report in 1990 and it will sit on the shelf for a while while the government incubates on it. Then you may be lucky if you have something in 1991 or 1992. I do not know the longevity or how old these people are that have these pensions waiting for them, but it does not seem to me that it solves an immediate problem.

My other concern is that if we do make the ex gratia recommendation and put it in this general report, are we somehow jeopardizing the general report? In other words, the government seems pretty hard line in this one case. I have sympathy for the individual who is affected, but I would not want to jeopardize the whole report and not have it called for debate simply because the government is objecting to one particular case.

I am wondering if we could simply issue a particular report. Then we can have some justification of this. We can talk about the urgency in terms of pension cases, asking for an ex gratia payment, asking also that the whole policy be reviewed by that particular body that Mr. Ward refers to, and have it as a special report, so that if their position is to continue to hard-line it and say we are not going to do anything until that body has reviewed it, at least they do not jeopardize our whole report by their calling it.

Ms. Morrison: I think if you look at the ministry's letter this morning, it appears that if we could give them a way to do this, they would do it. They do not say that they are not prepared to do this. They say they have explored every possibility and it is just impossible. If we now give them a way in which they can implement the specific recommendation, they can go ahead with their policy review.

But I do not read that letter as saying we do not want to do this at all. It says, "We have explored all possibilities for complying with the request of the standing committee..." I think we are now prepared to give them another possibility.

Mr. Philip: It does say fairly clearly the government's view is that the proper place to resolve the issue is the pension working group.

Ms. Morrison: That is the general issue. Yes, I agree. There were two recommendations. One was the issue of payment to Mrs. H and the other was the issue of whether these people in general should always be entitled. I read their letter as saying, "We would like to have implemented your first recommendation but we cannot find a way to do it and we think the general issue should be dealt with in this form."

Mr. Philip: So your position is that you do not feel that our general report would be in any way jeopardized or that the government would be influenced in not having it called for debate by including this particular case in it.

Ms. Morrison: If they are genuine in wishing to implement this particular recommendation, it would not need to be debated. In cases in which we have a compliance with your recommendations we do not wait for the debate in the Legislature. Many of our cases are just complied with following this committee's even informal recommendation.

Mr. Philip: If we are going to go back to them with a new recommendation, then this will not appear in this report anyway, because we would not have the answer in time then for the tabling of this report, would we?

Madam Chairman: Still writing it.

Ms. Morrison: But they often do not wait for the formal report of this committee before implementing a recommendation.

Mr. Philip: Why do we not go to them and decide whether or not it appears in our annual report depending on when we get a response and we can deal with that at that point in time? We may then have some idea of whether they are as flexible as Ms. Morrison thinks they are or as hardline as I suspect they are on this.

I would recommend that we write back to the minister, suggesting the

route the was proposed in our last session, concerning the ex gratia payments and in this case accept Mr. Ward's idea that the whole policy area should be reviewed by the working group and thank him for that suggestion and that we look forward to that report when it eventually comes and leave it at that until you hear from them.

Madam Chairman: I would like to hear from other members on that. Mr. Bossy, you are on the list.

Mr. Bossy: This business of ex gratia payments seems to be always a sensitive one with any of the ministries. I think this is the area that is the most contentious. I have to read within this letter from Mr. Ward the fact that the door is still open, but I am afraid that what I read into this letter is the ministry looking at the retroactivity that would take place to 1985 within this and starting a new method of payment that may be in our recommendations where we could have mellowed—or in our negotiations—so that it would be at present instead of going back. As there is no method in the past, it would be quicker to do something in the future and in the present; to pick up from here and not have to pay out a lump sum for three years.

I think the ministry might look at that a little more easily, and the financial implications it may have on other cases. This is an exception. It is a case that stands out. How many more are there of a similar nature that they would have to pick up if they went retroactive on one? It takes legislation and I can see that there may be the pressure to have this group react a little quicker, but on the basis of from now on instead of from way back.

Mr. Philip: I guess I have problems with that because it seems to me that if we are justifying that the payment be made from now on—

Mr. Bossy: It is a new idea. We can change minds—I mean by our influence.

Mr. Philip: Yes, but it seems to me that if somebody has something that is justified coming to her, then setting an arbitrary date and saying that it is justified from now on—if we are justifying it from now on then it was justified in the past. It seems to me that it is a little bit like plea bargaining and, not being a lawyer, I never really understood where the justice was in the plea bargaining system. It just seemed to me that it was more like collective bargaining than justice. I think she is either entitled to it or she is not entitled to it. If she is entitled to it, then give her the full amount.

1040

Mr. Bossy: It is a decision.

Mr. Philip: If she is entitled to it, then give her the full amount; if she is not—

Mr. Bossy: Her question did not come up until we had to deal with it. It was not back in August that the question was brought to the government to resolve; it was maybe brought to the standing committee on the Ombudsman to get results. In real terms, having no mechanism to deal with it, now is the time that we are saying strongly that the Teachers' Superannuation Act or whatever has to be changed to be able to accommodate that, but not necessarily retroactively on every case. In the future, this is what should be done, but the act should be amended so that it can accommodate that. That would include Mrs. H then.

Ms. Morrison: Just to clarify: This is not a new issue in one way, that is, it was brought up a number of years ago in your own pension plan and a retroactive amendment was made to your pension plan to provide for this very type of benefit. This is not new in the sense that it has not been a matter of consideration by the Legislature before. In the teachers' superannuation plan, it has not been implemented before now. In your own pension plan, it was implemented retroactively a number of years ago.

Madam Chairman: Also, as I recollect, we hashed all this out when we made our decision. Really what we are focusing on here is our recommendation, how we can expedite its implementation. If we can just keep to the contents of the letter and the inability of the Ministry of Education to implement our recommendation.

Mr. Lupusella: If I may, I feel quite comfortable with the recommendation made by the minister. It appears, and it is very clear from the content of the letter, that the minister does not have authority to direct or cause the Teachers' Superannuation Commission to make payment when there is no legislative authority for it to do so. Then the letter goes on to state that the best place to resolve this particular matter is the working group.

Based on my own analysis, the issue of Mrs. H is before the working group, because the issue has been referred to them by the Minister of Education. It seems proper for us as a committee to wait for a reply from the working group. I think the best vehicle to follow is to write a letter to it and get directly a response from the working group in the case of Mrs. H.

I do not see, in any way, that our authority as a committee is diminished by making a further recommendation that this committee will direct, through a letter, the issue of Mrs. H to the working group. We will see when this issue is going to be debated and what kind of results we are going to get before making a further recommendation as a committee. I am not particularly sure if in the past you had a similar case referred to the working group and what kind of response you did get in the past.

Ms. Morrison: A similar case as Mrs. H?

Mr. Lupusella: Yes.

Ms. Morrison: This working group is a new group. Mrs. H came to us as an individual complainant. She is very old. She is 79 years old, so if the working group takes very long to deal with the general issue, the issue of Mrs. H will go away. Our view of individual complaints we bring to this committee, and the committee certainly viewed it this way when it reviewed this complaint initially— The reason it made its recommendation in these terms was because it was concerned about the individual case. They asked the officials who were here at the time, "If we tell you to do this, can you do it?" The answer, and it is in your own Hansard, was, "Yes, we can." I think the committee made its decision to make this recommendation on an understanding that it could be done. Now that the ministry comes back and says it cannot do it, I think the committee is at liberty to ask, "What can you do?"

Mr. Lupusella: So we have two options, either to amend the law to make sure that—

Ms. Morrison: You made that recommendation, too, that it be amended.

Mr. Lupusella: Okay, so that is not the route which the minister

wants to follow, because he thinks the best way to follow this process is the working group, which up to the moment has not been explored on dealing with this particular issue. It appears that is proper. Even though we might be faced with some delay, I am not particularly sure when they are going to deal with this issue, but I think this committee can make it clear to the working group to deal with this issue as soon as possible. It is before them, based on what the minister's letter is emphasizing on November 18, 1988. So I do not see any particular objection for this committee to write a letter to this group to expedite the process as soon as possible on dealing with Mrs. H's problem.

Mr. Bell: You will recall there was a specific question asked of one of the representatives of the Ministry of Education before this case closed, and that was whether the Teachers' Superannuation Commission, at the direction of the ministry, had ever made something called an ex gratia payment. The answer was yes, but it was one that was specifically in anticipation of committed legislation. I believe the minister said: "Legislation is coming. Now, will you implement it before it is formally made law?"

The analogy perhaps is not yet complete, because we do not have a— I thought I understood from the ministry a commitment to this legislation, at least when I had that meeting. Regretfully, it is not set out in the minister's letter.

I think the suggestion made respecting a fine-tuning of your recommendation to reflect an ex gratia payment from any source is quite appropriate. There is no doubt your focus was on the Ministry of Education causing an ex gratia payment to be made by the commission, and that is not forthcoming.

May I suggest to you that you might consider slightly amending your recommendation to read that the Ministry of Education pay, or cause to be paid by the Teachers' Superannuation Commission, an amount equal to the survivor benefits, leaving no doubt that contemplates a payment of an equivalent sum from either of the two sources by whatever means. I think it will certainly give you the appropriate framework for discussions with Ministry of Education representatives when they appear before you at some time in the near future.

Mr. Pollock: This working group that has been set up, are they legally obligated to rule on it or is it just an ad hoc committee that has been put in place to make a recommendation? If it is just an ad hoc committee put in place to make a recommendation, then I do not think we have to hold back in that respect. I would have to think that if we went in this direction before, I would not have any other choice but to go along with the recommendation that we make a payment now.

Madam Chairman: I understand this is a task force that is set up to review pensions. It is just a working group.

Mr. Pollock: It is just a working group, it is not legislation.

Madam Chairman: That is right. I understand that. Does anybody interpret that differently?

Mr. Pollock: If we have done it for our own pensions, I would have to go along with doing it for Mrs. H.

Mr. Philip: I agree entirely with what Mr. Pollock and Mr. Bell have said.

The working group is to look at policy, it is not to adjudicate the case of Mrs. H. The Ombudsman has investigated Mrs. H and has come to a conclusion. We have agreed essentially with what the Ombudsman has said. We have come out with a slightly different variation. We know there is a way of making an ex gratia payment. It was clearly outlined by Mr. Zacks, and I think we accepted that that procedure, in a different situation, was a workable procedure.

1050

The woman is 79 years old. By the time the working group reports back on the general policy area and then that general policy area is worked up into changes in legislation and that legislation passes, without being ungracious to Mrs. H, she may have passed away. It could be 10 years. I do not know the state of her health at 79. I hope she lives to be 179, but she needs her money now, when she is in reasonable health and can enjoy her pension benefits, rather than at 99, when she may be in some kind of seniors' institution.

I think the recommendation should be an ex gratia payment along the lines that Mr. Zack has recommended in another case; that we thank Mr. Ward for his suggestion that the policy area be dealt with by the working group, and that we would like to be kept informed of the works and the decisions of the working group, since other cases may arise in the future that will be affected by it.

Madam Chairman: I just want to direct the committee to our draft 17th report, which we have not reviewed yet. In there on page 15 is the recommendation that the committee made after hearing this case in the summer. Mr. Bell has suggested an amendment that the Ministry of Education pay or cause the Teachers' Superannuation Commission to pay to Mrs. H an amount equal to. So it is a minor adjustment to the recommendation the committee made. I gather Mr. Philip and Mr. Pollock have supported that. I would like to hear from anyone who opposes that.

Mr. Lupusella: With great respect, I am going to oppose this particular recommendation because, as a committee, we are going to get to square one just for the sake of clarification. The issue of Mrs. H is before the working group, which has been set up to review various pension policy issues and benefit options available under the Teachers' Superannuation Act. We have to be clear on that.

Mr. Philip: If you read the letter, you will see that Mrs. H is not before the committee.

Madam Chairman: Mr. Philip, Mr. Lupusella has the floor.

Mr. Lupusella: "We have included this issue on the agenda for the working group and can therefore take no further action on this issue at this time." So I think the Ministry of Education and the Teachers' Superannuation Commission do not have legislative authority to make any payment whatsoever. Therefore, I have to oppose this particular recommendation made by our legal counsel.

Eventually, I am going to move a further recommendation that this committee direct and press, through the working group, the issue of Mrs. H, to get an immediate reply about the problem. So I am going to oppose this particular motion.

Madam Chairman: Any other opposition to this particular motion,

which is an amendment to our recommendation that was made in the summer? I see none. I am not sure whether a vote has to be taken on this. I think we should have a vote to alter our recommendation that was made in the summer.

Again, if I could direct the committee to page 15 of the draft report, which many of you may have with you today, because we are discussing that next on the agenda.

Mr. Philip: Madam Chairman, I think for the most part we have a consensus. If someone wishes to force a vote against the consensus, then that person can call for a vote, but otherwise we have a consensus on this.

Madam Chairman: I would rather have a vote on the amendment. Would you call for a vote on the motion? Thank you, Mr. Lupusella.

Could we have a motion that we can vote on?

Mr. Philip moves that Mr. Bell's recommendation be approved and that the recommendation contained on page 15 be amended accordingly.

Madam Chairman: The amendment was that the Ministry of Education pay or cause the teachers' superannuation to pay Mrs. H an amount equal to the survivor benefit.

Mr. Philip: I can put it fairly clearly that the words "the Teachers' Superannuation Commission" be deleted and that the words "be paid" be inserted after the word "to." So it would read "the Ministry of Education cause to be paid Mrs. H survivor benefits."

Mr. Bell: If I may explain that the purpose of the amendemnt was to now focus an obligation on the ministry to make—

Mr. Philip: That is what you are doing if you take away "the Teachers' Superannuation Commission" out of the recommendation.

Mr. Bell: I am not sure you want to leave them out. Right now there is one focus of an obligation to pay, that is the Teachers' Superannuation Commission. The purpose of the amendment that I suggested was to spread that to both. Okay? So, it is "the Ministry of Education pay" or "cause the Teachers' Superannuation Commission to pay."

Mr. Philip: Okay.

Madam Chairman: Mr. Philip moved the amendment to the motion that "the Ministry of Education pay or cause the Teachers' Superannuation Commission to pay to Mrs. H an amount equal to the survivor benefits as of," and the recommendation continues as we had made it.

I have a motion made by Mr. Philip. Do we want any further discussion on this before we vote?

Mr. Pollock: I move that we have the vote at 11:15 a.m.

Madam Chairman: Okay. Is that acceptable, to vote on that at 11:15? Is it possible to get Mr. Cousens sooner than 11:15?

Mr. Philip: Can we not have an informal stronghold and then that may not be necessary? Do you have some indication on some of the members or do you have a vote total?

Mr. Pollock: Do you have a vote? I am going to get Mr. Cousens. That is about the size of it.

Mr. Philip: If everybody is going to vote in favour of it, why waste 15 minutes?

Madam Chairman: We are not sure of that. Can we go on with other business and have the vote on that motion at 11:15? Is that acceptable?

Mr. Carrothers: Sounds good to me.

Madam Chairman: Okay. Thank you. Next is the committee's review of the 17th annual draft report, but since we need to do that and the expanded jurisdiction in camera, and at 11:15 we are having the vote, may I suggest that we give the opportunity for the Ombudsman's office to put on the record, and for the committee to give its response to the Ombudsman's hearings on expanded jurisdiction and the committee's hearing and press ahead with that. Then we can go in camera for all our discussions. Acceptable? Good. Mrs. Meslin, will you be presenting?

Mrs. Meslin: No, Michael will. I just would like to indicate to the committee that this particular response was drafted by the staff. Dr. Hill has not read it, but I have spoken personally with him, outlined what we intended to do and he felt it was very important that we put this forward to the committee at this time. If the committee will agree, then Michael can give you a summary and some explanations of it.

Mr. Philip: I guess I worry that such an important document might be interrupted, then, by a vote. I would like to see, when we are dealing with this, that we have our minds fully on it. Maybe we can take the vote now?

Madam Chairman: Mr. Philip, perhaps with the committee's approval we can take the vote now.

Mr. Philip: I can see that we do not have to wait 15 minutes.

Madam Chairman: Is it acceptable to the committee to have the vote now?

Mr. Philip: Yes.

Mr. Cousens: Could I hear the motion again?

Madam Chairman: You certainly can.

Mr. Bell: Allow me.

Madam Chairman: We will allow Mr. Bell, since he has the requesting document in front of him.

1100

Mr. Bell: Specifically, the motion is that the recommendation made by this committee with regard to the recommendation-denied case of the Ombudsman involving Mrs. H and the Ministry of Education—I will go through the technicalities of the amendment and then I will read the motion—be amended by inserting the words "pay or" between "education" and "cause" on the first line, and be further amended by inserting the words "an amount equal to"

between "Mrs. H" and "survivor" on the second line so that the recommendation now read:

"The Ministry of Education pay or cause the Teachers' Superannuation Commission to pay Mrs. H an amount equal to survivor benefits as of August 8, 1985, and that the Ministry of Education within three months of this motion on or about November 22, 1988, report to this committee on the advisability of extending this benefit as a matter of right to spouses of teachers' superannuation fund members adversely affected."

Mr. Pollock: Did you say 1988? It should be 1989.

Mr. Bell: No. They were to report to this committee by the 22nd of this month on the advisability of extending the benefits to all of the class of people represented by Ms. H; in fact, that letter from the Minister of November 18th is taken as the report on that basis.

Madam Chairman: Is any further explanation required?

Mr. Bossy: Just for clarification, you are saying we want now to add that the Ministry of Education pay. The other does not really matter because he has responded; there is no way he can cause it to be paid, because of the legislation presently in place. All we are adding now is to say, "Pay up, Mr. Minister," or that the act has to be changed, because there is no other way of doing it. I am just trying to put it in layman's language here to understand that.

Mr. Bell: No, I do not think so. I think the phrase "an amount equal to" may well have some impact on the Teachers' Superannuation Commission. As I understand the commission right now, its position very specifically is, "We can't make a pension payment to this person without statutory authority." I have not heard them say, "We can't make a payment under any circumstances." We have known of one circumstance in the past where they did make a payment prior to or in the absence of statutory authority, although legislation was imminent.

So I believe the intent is that both of the amendments will cause both the ministry and the Teachers' Superannuation Commission to give this more thought and reflection before coming back to the committee.

Madam Chairman: Okay. Could we have a vote on this motion? All those in favour of the amendment? All those opposed?

Motion negatived.

Mr. Philip: Maybe the Liberal members on the committee would now tell us what they intend to do with her.

Mr. Lupusella: There will be another motion which will be in place that this committee will make a recommendation to the working group, whoever the working group is, to deal with this issue as soon as possible. That is the recommendation.

Madam Chairman: I really did not want to revisit the whole question of the case of Mrs. H today. I think we had dealt with that at length during our summer sessions, and I think it would be inappropriate at this time to deal with it.

Mr. Cousens: He has just made a motion—

Madam Chairman: If we want to deal with this, then the committee will deal with Mrs. H again. It is unfortunate.

Ms. Meslin: Mr. Lupusella had indicated that his reading of the recommendation of Mr. Ward was that the term "issue" meant not only the general issue but the specific issue. I think the paragraph is a little ambiguous when we read it. Perhaps it might be helpful to get it clarified by Mr. Ward whether he meant that the issue was the individual issue and the general issue, because we seem to think it meant that because it is a working committee that does not usually deal with specifics, maybe they only meant the general issue.

Madam Chairman: I would like to get on the record what Mr. Lupusella's motion was again. If you could refresh our memories again, Mr. Lupusella. If you are making a formal motion, I would like it on the record.

Mr. Lupusella moves that this committee will direct the working group—whoever it is must be specified—to deal with the issue of Mrs. H and the general issue of a pension as soon as possible.

Mr. Bell had put up his hand in response to Mrs. Meslin.

Mr. Bell: I believe the ministry has subsumed Mrs. H into the general issue by concluding that Mrs. H cannot be dealt with except by legislation, which has general application to a like group. My expectation is that the working group would be dealing with the issue and its decisions on the issue would dictate what happens to Mrs. H. The ministry and the minister should be given every opportunity to speak for themselves on that point, but I believe that is the situation.

Ms. Morrison: With respect, I think the letter from the ministry suggests that they did try to solve Mrs. H's problem separately. They say, "We have explored all possibilities for complying with the request." It appears to me that they were really trying to deal with Mrs. H separately and have said that they could not do it. You now have the opportunity to provide them with another way to deal with Mrs. H separately.

The letter says, "The purpose of this letter is to report to you as requested on the recommendations made by the committee." I am reading from the Hansard of the day in which you considered the original case. They asked that "the Ministry of Education, within three months of this motion, report to this committee on the advisability of extending this benefit as a matter of right to spouses of the teachers' superannuation fund members otherwise adversely affected." In other words, this letter is a response on the general issue. As it happens, they are reporting that their efforts on the particular issue were unsuccessful.

Mrs. LeBourdais: I am just wondering how quickly we could get a response from the minister as to the specific working group and how long it would take them to get a reply. Obviously, at the age of 79, each day is precious. If we try to accomplish the needs of Mrs. H, time is of the essence. Can we get a response within a week or two or perhaps by the next sitting of this committee in two weeks?

Madam Chairman: I think that was the concern of the committee in the summer. That is why you see the recommendation that was carefully thought out

by the committee at that time, the one that appears on page 15. The recommendation was indeed to support Mrs. H's case and to support the Ombudsman's recommendation. We were trying to find a way of supporting that, as I recollect. That was the reason for the recommendation.

The committee has virtually just left the recommendation as it stands in the report, without amendment, that is, that we still recommend to the Ministry of Education to pay her survivor benefits.

Mr. Lupusella, as I see, is adding to that recommendation another recommendation. We have not defeated the actual recommendation that is in our report, that is, to implore the working group to deal with it as expeditiously as possible and to report back to our committee.

Mrs. LeBourdais: That still means the original time frame that the committee put on it.

Madam Chairman: No, because the time frame was November 22, which has passed. So we gave them three months to find a way to pay Mrs. H, if I may say so. They have responded that they are unable to do so in the three months and that they would like to wait for the working group to make some kind of recommendation. That is the way it stands now in the response from the Ministry of Education.

1110

Mrs. LeBourdais: But we have no idea when that group sits.

Madam Chairman: That is correct. I think that could be done quite informally. You could cause the chair to write a letter to the Minister of Education and inquire what the time-line is on the working group.

Mrs. LeBourdais: I am wondering then if that could be added to Mr. Lupusella's amendment.

Mr. Lupusella: We do not have to, but I do not have any objection.

Mr. Charlton: You have to slow down for a minute, understand what you have done and understand what the working group is. The working group is a policy group. Think back to what Mr. Bell said a few minutes ago in response to the questions about the letter. All that is going to come out of the working group is a recommendation about changes in the legislation. What the ministry has said is that they can find no way to pay Mrs. H without new legislation.

You have been around here long enough to understand the legislative process. There is no way in this route through the working group that Mrs. H can get money quickly. It is impossible. That is why the recommendation was made to change our recommendation, to try to broaden the original recommendation to put some focus on the ministry, simply because the working group will have no authority to do anything other than recommend changes in legislation back to the minister, which will then have to go through a drafting process and the regular legislative process. You are looking at a couple of years, not days, weeks or months.

Mr. Carrothers: I wonder if I could explain something to my honourable friend, then. It is important he understand the difference that change in the recommendation would have made. It was a recommendation, when

this committee made it, to have the ministry work with the pension fund to try to find this money paid from the pension fund. The change that was suggested would now have the ministry making that payment, which is a very different principle. I think we have to be careful here that we are not establishing a principle that moneys are going to be paid for the purposes of pensions out of funds other than the pension moneys, because you may be putting the cart before the horse and end up predeciding a question that—

Mr. Charlton: The recommendation for an amendment—

Madam Chairman: Mr. Charlton, Mr. Carrothers has the floor.

Mr. Carrothers: One cannot establish a principle that the moneys come from some other source than the pension fund. That is the concern with that change and that is basically the reason the vote went the way it did. I think Mr. Charlton should understand the implications of the amendment, because I do not think he does.

Mr. Charlton: Mr. Charlton only understands the implications. The recommendation was stated the way it was stated, as Mr. Bell very clearly set out, to give the ministry the option of proceeding quickly to change the legislation and have the commission pay or to pay itself. It did not fix any obligation on the ministry, it gave the ministry that option. We fully understood that.

Madam Chairman: Any further discussion on Mr. Lupusella's motion which will add to the recommendation laid out on page 15 of our 17th draft report, which we have not discussed yet, but it is a combination of what we made a recommendation—

Mr. Bossy: That is the crux of the whole thing. Here we are to discuss a report that we have not made yet, with a recommendation that we need to amend because the recommendation has already been replied to. Therefore, it needs an amendment based on a reply we received from the minister. This is why we are in the dilemma we are in now. Had we had this report tabled prior to this letter from the minister, I can assure you it would have been a different ball game.

Madam Chairman: I think that is not accurate. The report is public, in that we made the recommendation on Hansard after hearing the case of Mrs. H. The report merely formalizes our recommendation. It has not been debated by the House. The committee certainly is at liberty to make any adjustments to its report that it wishes, except that the recommendations are on the record from the cases. The one you see in our draft report is the recommendation that was made on the case in the summer.

Mr. Pollock: Why do we not make a motion that the minister bring the bill into the House?

Madam Chairman: Can we just deal with the motion at hand?

Mr. Pollock: Well, we will deal this, but there is not much point in making any others.

Madam Chairman: That is the one on the floor at the moment.

Mr. Pollock: I do not know how to deal with it.

Mr. Cousens: Maybe we will vote it down and then bring another one.

Madam Chairman: Maybe we will. Perhaps I could just have the clerk read the motion again.

Clerk of the Committee: Mr. Lupusella moves that this committee will direct the working group to deal with the issue of Mrs. H and the general issue of pension as soon as possible.

Madam Chairman: All those in favour of that motion, please indicate.

All those opposed?

Mr. Philip: I just want to record I voted against and take the same prerogative as Mr. Carrothers.

Madam Chairman: I do not have everybody, if I may, Mr. Philip. We have seven in favour of the motion.

Those opposed? Mr. Philip, Mr. Charlton, Mr. Pollock. Are you opposed?

Mr. Pollock: Yes, because I want to put on the record—

Madam Chairman: Okay, you can put on the record why you are opposed, but perhaps I can just get the count.

Mr. Cousens: Just to follow up on the point that I think Mr. Pollock is trying to table, possibly the best thing is for him to give notice of motion that he will move or cause to be moved that the minister be requested to bring forward legislation to address and resolve the concerns that pertain to Mrs. H. By putting that on the table, either he or I could make that and that means we can bring it forward at a future meeting. Otherwise, I think it might be difficult to get it on the agenda.

Madam Chairman: Not difficult at all.

Mr. Cousens: At least it puts us on the record.

Mr. Pollock: I could not have said it better.

Madam Chairman: Good, then it is on the record. We are hoping to review the report, not likely today but in the next few weeks. Would you like to put it on the record again at that time?

Mr. Pollock: Sure, I would be glad to.

Motion agreed to.

Madam Chairman: Great, thank you. The motion by Mr. Lupusella carried.

Mr. Philip, do you want to put on the record why you opposed the motion?

Mr. Philip: I think it is a dangerous precedent, and I use Mr. Carrothers's words which he likes to use so often, for this committee, whose role it is to adjudicate whether the ministry or the Ombudsman is right in the case where there is disagreement, to suddenly abrogate our responsibilities on the merits of a particular case and send it off to some committee, some group

of bureaucrats in the ministry or whoever else they may choose to sit on the committee—and we do not even know that such a committee exists at this point in time—to readjudicate a case. That is what you are doing when you say that this ad hoc group that somehow exists out there, which you do not even know, is going to retry, if you want, or rehear the particular merits of the case of Mrs. H. We have decided that Mrs. H deserves to be paid.

I have no objection to the ministry setting up a committee to look at a particular policy area and to recommend changes in regulations or legislation. I think that is reasonable, and indeed, they might look at the case of Mrs. H as an example of why that change is needed. But I really take very strong exception to our abrogating our responsibility, which is to decide in a particular instance where there is a disagreement between a particular ministry and the Ombudsman regarding a particular individual or group of individuals and say, "Well, we have decided that they deserve to be paid, but somebody else should take another look at it as well and decide whether these people should be paid." I think that is a dangerous precedent. I think this committee is certainly going to remember the day it made this decision.

I have great sympathy for Mrs. H; obviously, the members of the committee must have had when they decided in her favour. We will rue this day that we have made this very bad decision of giving our responsibility to somebody else to second-guess us and to second-guess the Ombudsman.

Mr. Lupusella: You voted against Mrs. H's case just a few minutes ago.

Mr. Philip: Mr. Lupusella, as usual, does not understand the principles of the cases.

Madam Chairman: Mr. Lupusella, Mr. Philip is just concluding his remarks.

Mr. Philip: I am just disappointed disappointed that somebody with Mr. Carrothers's intelligence would have allowed Mr. Lupusella to be the lead spokesperson on the committee on such a complicated issue and take the committee in this direction.

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Madam Chairman: Any further discussion on this matter before we press along? Thank you. I have this uncanny temptation to ask if the Ombudsman's office would keep us apprised of Mrs. H's health so that we can reflect on our decision.

Again, if I may bring the committee back to the Ombudsman's response to the standing committee's hearings on expanded jurisdiction, it looks as though we will just have an opportunity to get to this, reflect on it and then reconvene at a later time to discuss both this and the 17th report as issues. Mrs. Meslin, do you have anything further to say before Mr. Zacks commences?

Mrs. Meslin: No.

Madam Chairman: Mr. Zacks.

EXPANSION OF OMBUDSMAN'S JURISDICTION

Mr. Zacks: This is a summary of some of the views Dr. Hill has about

the issues that were raised during your hearings. Essentially, he is responding to some of the arguments made by the various representatives of both the government agencies that came forward and the organizations over which expanded jurisdiction is being discussed. I am not going to go through it word by word, but simply try and summarize what the thrust of it is.

There were essentially three arguments that were made by virtually all the agencies—the children's aid societies, public hospitals and the Ontario new home warranties plan. Those were that there currently exist adequate mechanisms of review for those agencies, that the Ombudsman currently does investigate some of their decisions peripherally and that they are currently doing such a good job that you do not need an ombudsman to investigate them, in any event. Dr. Hill responds to those arguments and rejects them.

Essentially, we can now investigate decisions involving public hospitals, the home warranty program and children's aid societies, but these are what we call derivative investigations. They involve complaints about the role that the ministry plays in these areas and, with respect to the public new home warranty program, with the Commercial Registration Appeal Tribunal.

The thrust of Dr. Hill's response is that these are not adequate ways of dealing with the complaints made by the individuals. We are unable to actually investigate the decisions made by the hospitals, the children's aid societies and the home warranty program. Currently, we have been getting a number of complaints actually involving public hospitals where individuals have gone to the Minister of Health (Mrs. Caplan). These complaints are currently under investigation. Dr. Hill, in this report, refers to them very generally because we cannot talk about them in detail, but it does indicate to us that there certainly is a need to be able to deal directly with the type of issues that these complaints raise.

We also discuss to some extent why we picked these particular organizations over all others. This is a carry-on from Dr. Hill's preliminary report that he made to you a couple of years ago. We talk about them as being quasi-public, quasi-governmental organizations over which there is some governmental control, access to the courts from them, reviews to organizations that we do investigate, like the Commercial Registration Appeal Tribunal and the Hospital Appeal Board, and try to show that they are, to a great extent, funded by either public moneys directly from the Treasury or, in the case of the new home warranty program, where the fees that are paid by the builders who have to be registered in the program are directly passed on to the home-buying public.

Dr. Hill also talks about some of the staffing impact that expanded jurisdiction will have. You will recall from the hearings that it is very difficult to predict with any kind of certainty what that impact will be.

We also try to indicate the difference between the way the Ontario Ombudsman investigates complaints and the way that ombudsmen in smaller ombudsmen offices investigates, such as in the New Brunswick Ombudsman's office and the Manitoba Ombudsman's office. We try to point out that some of the reasons for these differences and the fact that it appears that those offices can handle a much greater file load than it has been suggested that the Ontario Ombudsman investigators carry.

One of the concerns that has been raised is the rules that this committee has established for the Ombudsman preventing what we call informal inquiries and dealing with investigations by phone. These rules, and the

approach that the committee takes in requiring the Ombudsman to meet the very specific requirements of the Legislation in all cases, really imposes a very legalistic format on us, which other Ombudsman offices do not have. They can deal with complaints in a much more liberal and informal way.

The other factor that we wanted to point out which was raised particularly in New Brunswick is—one of the comments made by the New Brunswick Ombudsman's office is—that they can contact any deputy minister at any moment to deal with a particular complaint. It does not work that way in our office. The bureaucracy in Ontario is much greater, much larger and much more complex.

Mr. Lupusella: If I may, I would like to interrupt the proceedings of this meeting and ask the member for Etobicoke (Mr. Philip) to withdraw the statement which he made just a few minutes ago.

Madam Chairman: Mr. Lupusella, there was no statement made on the record, and I think that Mr. Zacks has the floor. I understand that he has the floor and that he is the only one who is being put into Hansard. Comments made in blank air, not on the record, I do not think should be withdrawn. Mr. Zacks, would you continue.

Mr. Zacks: Thank you. There is one particular point that we would like to make that has not been made before because it is a relatively recent development, and it is on page 6 of the submission. It starts with the phrase, "My greatest concern," and it gives the particular something that has concerned us for some time and it has been brought to a head by the Attorney General (Mr. Scott). It deals with a fairly legalistic, almost adversarial, approach that has been taken towards the Ombudsman.

A recent position taken by the Attorney General is that the Ombudsman does not have the legal authority to investigate complaints which may involve a criticism of an order in council.

We are going to court on that issue because the implications are rather extremely significant for our office, because, as you know, regulations are implemented by orders in council. If the Attorney General is correct, and that the Ombudsman cannot investigate a complaint because the potential is to criticize the order in council, we might as well forget most of what we are talking about and have been discussing here for some time. I would estimate that about 70 per cent of what we investigate involves regulations or orders in council.

With particular reference to public hospitals and the new home warranty program, if the Attorney General is correct, well, we might as well forget the whole business of those agencies, because, as you know, public hospitals and the new home warranty program, although there is legislation setting up the public hospitals in the program, the actual day-to-day operation is pursuant to regulation, and this holds true in virtually all areas. In fact, it is very difficult to find any governmental organization that would currently investigate this that does not function to some extent, on and in many cases to a large extent, on orders in council.

We are currently in the process of instructing council to initiate an application under the Ombudsman Act to have this resolved and I cannot underemphasize the significance of this challenge. We raise it for your information because it does have a direct impact on your considerations.

Finally, in terms of the actual submission, there is a suggested draft amendment to the Ombudsman Act which would bring in public hospitals, the Ontario New Home Warranty Program and children's aid societies into the Ombudsman's jurisdiction.

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The other part of this is some charts we have prepared in the hope that they would illustrate where the Ombudsman currently has jurisdiction over these organizations and the peripheral government structure surrounding them; what expanded jurisdiction will do to the Ombudsman's jurisdiction; what he will be able to investigate, what type of complaints and what aspects of the organizations; and what he will not be able to investigate currently or with expanded jurisdiction, should it be made.

Mr. Pollock: I was very interested in the comment made by Mr. Zacks that the Attorney General has claimed that we as a committee and the Ombudsman do not have the authority to investigate any cabinet decisions. Is that what you actually stated?

Mr. Zacks: The Ombudsman's position is that we will not investigate cabinet decisions but we will investigate the administrative actions that implement those cabinet decisions; the decisions, actions, recommendations or omissions made by government officials in the carrying out of the responsibilities given to them by orders in council analogous to those responsibilities they carry out in implementing statutes.

The Attorney General's argument is that because the Ombudsman Act excludes jurisdiction over the deliberations and proceedings of the executive council and its committees, that prevents the Ombudsman from investigating any complaint which may have the effect of criticizing an order in council, and that one of the Ombudsman's roles or functions is to be a type of critic of legislation. The Ombudsman Act specifically permits the Ombudsman to conclude that although administrative action is properly carried out, it was done so pursuant to unreasonable or unjust or discriminatory legislation. That is clear in the Ombudsman Act. By this legal advice he has given to us and the opinion he has taken with respect to a number of complaints, Dr. Hill sees it as a major challenge and concern to his office.

Mr. Pollock: I find it rather strange that the Attorney General would interpret it that way, because I was always of the opinion that it was the job of the Ombudsman and this committee to investigate big government; not more or less step on the little fellow but investigate big government. That was basically the train of thought which I thought came out of even the convention in Canberra: That is why the Ombudsman is there, to see that everybody got a just deal. I would like Mr. Bell to comment on that.

Mr. Philip: Maybe Mr. Bell wants to think about his answer. I just wanted to ask a couple of questions.

Mr. Bell: This is not the first time in the history of the Ombudsman's office that the Attorney General has become directly involved in a matter of jurisdictional challenge to the Ombudsman's office. The Attorney General of the day, Roy McMurtry, was very involved in the question which went ultimately to the Court of Appeal for determination on the Health Disciplines Act. The Attorney General's position and argument on that case was substantially identical to that of the Health Disciplines Board, and this committee had something to say about that, about whether it is given that the

Ombudsman is a servant of the Legislature and what the role of the Attorney General is. The committee had something to say about whether it was appropriate for the Attorney General to assume a position to challenge the jurisdiction of the Ombudsman.

I would like to know a little more about the facts of this case. Maybe Mr. Zacks and Mrs. Meslin can share some preliminary matters with me without breaching any confidentiality. I read what Dr. Hill says on page 6 about the potential impact of a challenge to authority over anything done by an order in council going all the way down to regulations.

As I say, I am not sure that that is what the Attorney General is saying in that particular case. If there is an order in council that says, "J. B., you go and do that," and if J. B. does that and there is a complaint to the Ombudsman's office, it may well be appropriate for the Attorney General to say on behalf of the government, "J. B. is merely carrying out what the order in council said, and you cannot look at what J. B. did because you would be indirectly assuming jurisdiction over an order in council." That may be a simplistic view.

On the other hand, Dr. Hill says that regulations are passed pursuant to orders in council. So if you extend that argument I cannot do anything that relates to a regulation; and therefore, I cannot do anything that relates to 75 per cent of how the public service runs in this province. If that is part of the Attorney General's position, then—I will speak personally—I would be significantly concerned over that point of view and it would represent a dramatic departure from the role that the Attorney General has historically assumed that the Ombudsman has played. I prefer to find out exactly what the specifics are.

I may conclude it is a tempest in a teapot; on the other hand, I may have some concerns to share with you. If you would like me to do that, to meet with the Ombudsman's office to see if I can get the particulars of that or otherwise arrange for it to be put on the agenda for some further discussion, perhaps as early as January, we can do that.

Mr. Pollock: It is almost as if we made a right turn and we were heading back to the old days with the divine right of kings, the cabinet being the king. I just do not see it that way. I thought ombudsmen were there to protect the individual.

Mr. Bell: There is no doubt that as far as the Ombudsman is concerned, the cabinet cannot be investigated. I guess the question that is being put is, how far does that cabinet protection extend? Does it extend down to the messenger boy who delivers something pursuant to a cabinet order, to use perhaps an extreme example, I do not know. Obviously, it is a matter that the Ombudsman wants this committee to consider in the very near future.

Mr. Philip: Pursuant to that, I was very concerned about the regulatory aspects of this, because we are talking about a majority of decisions that are done by regulations. It would appear that if that is the Attorney General's position, it directly contradicts a report of a committee of this Legislature, namely the standing committee on regulations and private bills, which turned out an excellent report, supported by all three parties, which expressed concern about the whole regulatory system—

Mr. Zacks: I should say that the correspondence that we have received from the Attorney General and another government organization, which

raises the same argument, deals specifically with top orders in council, not regulations. The issue of regulations is, in our view, the logical extent of that argument.

Mr. Philip: But the regulations are passed by a committee of cabinet, are they not, before they become—

Mr. Zacks: They are signed by the Lieutenant Governor in Council.

Mr. Philip: Therefore, regulations would be included?

Mr. Zacks: They are in the form of an order in council.

Mr. Philip: It is a cabinet document.

Mr. Zacks: Yes, it is. Then they are published in the Gazette or filed to become regulations.

Mr. Philip: The point that I was making is that the committee on regulations that has studied this has turned out a report that says that it is very concerned that bureaucrats or public servants may be passing regulations that sabotage legislation, that may be contrary to the Charter of Rights, and indeed that may be contradictory to other regulations. It has turned out a fairly extensive report on the civil liberties' aspects of the regulatory system and of recommended things such as a review system, sunseting of regulations if they are not looked at and re-enacted, computerization and a review of all regulations.

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It is a fairly extensive report, and it came out of some fairly extensive legal research suggesting that an awful lot of our citizens are being governed by regulations that are unfair, contrary to the Charter of Rights, perhaps, or indeed that a majority of people do not know about and are violating the law through accident. If the Attorney General is taking this position, then it goes contrary not only to what this committee may be saying, but contrary to the whole theme and thrust of the regulations committee.

Mr. Zacks: As I have indicated here, Dr. Hill is prepared to take this matter to the Divisional Court to obtain a court's declaration on the appropriate interpretation of our files.

Mr. Lupusella: I would like to raise a supplementary question about the issue which is before the Divisional Court. When are the cases going to be heard?

Mr. Zacks: In the near future.

Mr. Lupusella: In the near future?

Mr. Zacks: The very near future.

Mr. Lupusella: Okay.

Mr. Bossy: In view of the fact that I do not recall any public statement regarding the Attorney General's concerns about what you have jurisdiction over, I do not believe I have received across my desk anything in that line. Officially, by having this summation here of the Ombudsman's office

over the jurisdiction and that concern that you have over the Attorney General, this becomes a public statement now. Do we have access to any and what brought this on when this was made to you by the Attorney General's office?

Mr. Zacks: The actual specifics of it will be contained in the court documents once they are filed and those will become public documents. Currently, it is in the context of a number of ongoing investigations, which have been stopped because of this position.

Mr. Bossy: Because it says, "My greatest concern is with a jurisdictional challenge from the position taken by the Attorney General about my right to investigate." That, to my knowledge, has not been public.

Mr. Zacks: No. This is the first time it has been raised.

Mr. Bossy: I see. The first time.

Mr. Zacks: It has been raised in this context because it is relevant to your consideration of these issues.

Ms. Meslin: Mr. Bossy, it would not have come to your attention in the way that I think you feel it would. It only comes to our attention because there are several cases we were in the midst of investigating that received responses—from the Attorney General in one case and from one of the governmental agencies in another case—putting these arguments to us.

Mr. Bossy: But you have not brought that forward to us because—

Ms. Meslin: Because the case is not finished at this point.

Mr. Bossy: It is a case, but it sort of hits at the heart of the whole jurisdiction of the Ombudsman. It is not that just by a sudden stroke the Attorney General's office has been obstructive or given the indication; we have not been given the indication because we should be aware of that from your office if that has transpired. I am just wondering what the source is of that really big concern with evidence of where it took place, where he made the statement. The Attorney General is implicated here and he must have made a statement to you in response to an inquiry on cases thereby jeopardizing the whole Ombudsman's office. This is serious.

Mr. Zacks: That is our view of it.

Mr. Pollock: To maybe change the subject just a little, I wonder what right have we as members to bring up a particular subject? In other words, in the Ombudsman's report he recommended that we expand jurisdiction over public hospitals, the home warranty program, and the children's aid society. Do we as individuals have any rights to make any recommendations here at all? Could you answer that?

Clerk of the Committee: The standing orders of the Legislature authorize you to review and make a recommendation to the Legislature. That is what you are doing.

Mr. Pollock: Regardless of whether it was in his report or not, I guess.

Clerk of the Committee: It is your recommendation of your report.

Mr. Pollock: I would not mind putting on the record right now that I firmly believe if we expand any jurisdiction, that we strongly consider expanding jurisdiction over conservation authorities. I have had quite a few complaints about the authority of conservation authorities and the fact that sometimes when there is property in a floodplain that they will not even pay them the going rate.

That disturbs me. I can understand the conservation authority wanting property for a floodplain, that park or whatever. They seem to think that they are not getting paid the going rate. That is a major concern to me. It is a bigger concern to me even than having jurisdiction over the hospital boards.

Madam Chairman: I would like the opportunity for the Ombudsman's office to respond to your comments. However, I just want to remind the committee that in the last two years it reviewed a report from the Ombudsman. These were the only three areas which the Ombudsman's office was suggesting expanded jurisdiction in. We explored a number of other areas in our discussions and did agree to just focus on these three.

By all means, if the committee wants to bring what it seems to be inequities forward, then I think that this is the opportunity to do so. I just want to remind the committee that we are dealing with just these issues. From the Ombudsman's office, Michael Zacks, do you have any response?

Mr. Zacks: We get a number of complaints annually about conservation authorities. It is the Ombudsman's position, having looked at the legislation, that we do not have the right to investigate complaints specifically about conservation authorities. We can investigate complaints about the Minister of Natural Resources and the mining and lands commissioner who has a role to play in conservation authorities, but if you want to throw it in, that is fine.

Mr. Philip: As I understand it, though, Mr. Zacks, I think I have sent some very concerned citizens to you.

Mr. Zacks: I met with them a number of times.

Mr. Philip: My position is that I am not there to try or retry the decision, but it would appear to me that the mining and lands commissioner seems to act in somewhat of an arbitrary manner. You do have jurisdiction over that. What decisions or complaints against the conservation authority would not be a complaint against that very body that makes the decisions?

Mr. Zacks: I think it would be their expropriation decisions, decisions affecting the floodplains, for example, expanding it. My understanding of the role of the mining and lands commissioner is it is an appeal mechanism for certain specific requests for variations to the conservation authority's floodplain plan and the way it is zoned in different areas in its floodplain.

I do not think the commissioner actually has authority over major planning terminations, but I could be wrong on that. Your complainants are the first ones who have actually been raised the mining and lands commissioner that have been involved with us. To my knowledge we have never had a complaint that narrowly focused. In the past, the only complaints that we have received are complaints about conservation authorities in general. We told our complainants that we do not have authority to investigate those specific complaints.

Mr. Philip: I guess what would be interesting to find out would be whether or not there is not at some point in time a decision or recommendation on almost anything that they do that is part of the mining and lands commissioner's recommendation. If that is the case, then you probably have jurisdiction.

Mr. Zacks: In an indirect, derivative way, just as we have over decisions of the Ministry of Community and Social Services, children's aid societies and the Ministry of Health with respect to public hospitals.

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There are limitations on those types of investigations. They do not deal with direct practices, procedures and actions of conservation authority officials. We can only look at what was before the mining commissioner in terms of the kinds of issues and arguments put forward to him or her. We are not able to go behind those, because it is a quasi-judicial format. The commissioner must look in theory at what has been presented to him or her and make a decision based on the evidence, whereas we would have jurisdiction over the entire spectrum of organizations involved in the decision; we would be able to look at everything that goes on in the process.

If an error had occurred or an unreasonable action had occurred, we would be able to recommend to the most appropriate individuals in the process where change should take place, rather than working at the end of the process, where policies and statute would prevent the minister from making--- As in the case which was before you today with Mrs. H., where the ministry does not have any authority to deal directly or order someone to take specific action.

Mr. Philip: I am just thinking out loud, and maybe Mr. Pollock will have some comments on this. It seems to me that as a number of us are getting complaints about the conservation authorities and as we are certainly not in a position to do those investigations ourselves and would become frustrated with it as MPPs, it might well be worth our while if at some time the Ombudsman did bring in a report that would at least say where he feels his jurisdiction extends.

The committee might at that time want to look at the conservation authority, or what we might want to do, and it has been done in other committees fairly successfully, is to say, "We have this much on our plate, but there is another committee of the Legislature which we would recommend look at the whole regulatory process," in this case, the standing committee on regulations and private bills.

The standing committee on government agencies would be another one which could look at it, but the regulations committee has done some excellent work lately, and it is concerned about whether regulations are fair and in keeping with due process, etc., and it might well do an excellent job of looking at that one agency. It might be something the Ombudsman might want to consider.

Madam Chairman: I am just looking at the hour. Unless there are any further comments on Mr. Zacks' presentation on behalf of the Ombudsman, I would suggest that we conclude this area now. I do not see anyone.

I want to direct the committee's attention, in case members did not notice: The Ombudsman's office has provided us with some information we had requested. I am looking at public hospitals: the area in which the Ombudsman currently has jurisdiction; where the Ombudsman would have jurisdiction if we

approved expanded jurisdiction; and where the Ombudsman would not have jurisdiction if we expanded this jurisdiction. I think these will be very helpful in our deliberations in knowing exactly where in the process expanded jurisdiction might affect it.

Mr. Bell: On those charts, Mr. Zacks, the first one after page 7, the public hospital organization and jurisdiction thereunder: Just for further definition, the jurisdiction you are seeking over the hatched-line areas does not include any act of any one or a combination of those groups which is properly considered the practice of a health discipline.

Mr. Zacks: That is correct.

Mr. Bell: For example, the chief of medical staff in his capacity as surgeon in that hospital may do or direct something that is within the practice of medicine and that is not within it. So it would be the chief of medical staff—

Mr. Zacks: His administrative capacity.

Mr. Bell: His administrative capacity, okay. And the same would follow for anybody else.

Mr. Zacks: Exactly. The reason for that is the statutory right of appeal to the colleges over medical actions.

Mr. Bell: All right. If we turn to the next page, the patient complaints, those complaints over which you have jurisdiction to investigate would not include anything which relates to the practice of a health discipline by any member of the hospital staff.

Mr. Zacks: Not directly; that is correct. Indirectly, if you look at the chart, you will see those complaints wind their way up to the Health Disciplines Board and that is where our jurisdiction fits in.

Mr. Bell: No, I understand it that way. Again, the next chart—

Mr. Zacks: The next chart is wrong. The computer left out some hatch lines.

Mr. Bell: Can you fill them in?

Mr. Zacks: I will be sending you a revised form this afternoon.

Mr. Bell: Okay, but again, complaints by doctor/nurse/employee which relate to the practice of a health discipline, either how it is or how it should be or how it was done, are not within your jurisdiction.

Mr. Zacks: No.

Mr. Bell: Those are all the questions I have.

Madam Chairman: I would like to ask the subcommittee if you could put on your agendas that after the committee meeting on December 7 we meet to discuss the case of Mr. A. Our next meeting is December 7, as agreed at the beginning of the meeting. It is at 10 o'clock in the morning. If the subcommittee could put on its agenda after the committee meeting that it will

meet to discuss the case of Mr. A? If there are any problems with that, perhaps we can discuss that over the next two weeks.

Mr. Lupusella: Official notice will follow as well.

Madam Chairman: Official notice will follow. Are there any further comments before I adjourn? The meeting is adjourned until 10 o'clock, December 7.

The committee adjourned at 11:58 a.m.

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STANDING COMMITTEE ON THE OMBUDSMAN

CASE OF MR. A
CASE OF MR. B

WEDNESDAY, DECEMBER 7, 1988



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Bossy, Maurice L. (Chatham-Kent L)
Carrothers, Douglas A. (Oakville South L)
Charlton, Brian A. (Hamilton Mountain NDP)
Cousens, W. Donald (Markham PC)
Henderson, D. James (Etobicoke-Humber L)
LeBourdais, Linda (Etobicoke West L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Clerk: Carrozza, Franco

Staff:

Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon
Wilson, Jennifer, Research Officer, Legislative Research Service

Witnesses:

From the Office of the Ombudsman:

Meslin, Eleanor, Executive Director
Zacks, Michael, General Counsel
Morrison, Gail, Director, Investigations

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Wednesday, December 7, 1988

The committee met at 10:26 a.m. in committee room 1.

Madam Chairman: We appreciate those who were here waiting for everybody to arrive. We do apologize for the late start of the committee this morning, but we are most productive. We thank you.

For Hansard reasons, we have to identify those who are before us other than committee members. We have Michael Zacks, Gail Morrison and Eleanor Meslin. I do not think they have to make many presentations to the committee today, but when and if you do I would appreciate it if for your first time speaking you would identify who you are for the record, if I neglect to do so.

We have three things on our agenda today. The first is the report of the subcommittee on communications, then the standing committee on the Ombudsman has an update on one of our cases, then we are to go in camera to discuss our 17th report. Everyone should have a draft before him. I hope we can get through at least the initial discussions by 12 o'clock today.

CASE OF MR. A

Madam Chairman: I would like to start with the subcommittee's report on communications. Mr. Bell will outline the case which has been reviewed by the committee this morning and on previous occasions.

Mr. Bell: I apologize. This is a report which is ordinarily and I think appropriately given by the chair. The timing of the subcommittee's deliberations this morning did not afford me the opportunity of doing that. In view of the committee's conclusion in the matter, the first interest is to report to you and have you make a decision on the matter rather than the formality of who delivers the report.

In any event, the subcommittee considered the single issue of Mr. A. You will recall that Mr. A is the individual who some time ago, through a former member, Yuri Shymko, communicated to the committee his concerns over the Ombudsman's process and the Ombudsman's conclusions in a report relating to Mr. A's particular complaint that his employment with a particular office within the Ministry of the Attorney General had not been renewed.

You will recall that back in January of this year, the subcommittee reported the results of a relatively lengthy investigation undertaken by it and by me on its behalf concerning the allegations of Mr. A, directed against the Ombudsman, relating to the investigation and the initial report itself. In January of this year, the subcommittee reported what it considered to be an appropriate disposition of the matter as the circumstances then presented, and you concurred and so by motion adopted the subcommittee's report.

It is appropriate that I read that to you now, because the rest of the subcommittee's report is really against the background of that. On January 21, 1988, you ordered by motion, "that the Ombudsman reopen his investigation of Mr. A's complaint and, in particular, but without limiting the scope of this investigation, he first obtain further evidence concerning relevant issues, interviewing under oath if necessary additional witnesses, including Mr. A's supervisor, and provide Mr. A with an opportunity to make submissions in

person on any or all statements about his character contained in the Ombudsman's existing report; and that he obtain further legal advice from an independent legal counsel on which legal issues surrounding the employment contracts of Mr. A, which contracts were allegedly terminated, and give Mr. A or his legal counsel an opportunity to make submissions on those issues before any final conclusions are made; and that the Ombudsman, after the investigation is concluded, report his findings, opinions, conclusions, and recommendations, if any, to both Mr. A and the committee as soon as possible."

The Ombudsman commenced that reinvestigation shortly after January 21. In September of this year—specifically, I believe, September 30—he presented his report on his investigation to Mr. A. Within a week of that or shortly thereafter, the Ombudsman's office provided a copy of the report to the subcommittee through me, which was subsequently distributed to the subcommittee two weeks ago, when it started its deliberation into this matter.

Because your motion spoke to a provision of the report to you, and for other reasons, the subcommittee believes it is appropriate for you to receive a copy of that report in an anonymized form, which will be placed before you by the clerk.

Mr. Lupusella: Which page is this?

Mr. Bell: No, this will be the report. It is the wish of the subcommittee that this report become a matter of this committee's record. Members; that will be one of the issues you will be deciding when I have finished my report.

Mr. Lupusella: You mentioned a contract which was not renewed by the Attorney General. Was the contract expired and therefore the Attorney General did not want to renew it, or did something happen in between?

Mr. Bell: The initial employment of this individual was a six-month contract which was about to expire. There was discussion and consideration given to the renewal of that contract on a 12-month basis. The decision was taken, nevertheless, by representatives within the Ministry of the Attorney General not to renew the individual's contract.

Mr. Lupusella: Another tangent of this background information, which you can give us: Was there any particular clause in the contract that the contract may or may not have been renewed at the discretion of the Attorney General?

Mr. Bell: I cannot speak to that question specifically, except to say that the term of the initial contract was very explicitly a six-month duration. The law is quite clear on that; when that duration expires, if there is not a separate and distinct act of a new contract, it is over.

Mr. Lupusella: There is no legal obligation.

Mr. Bell: Yes. As I have just read, one of the things the Ombudsman was required to do by the committee was to take an independent legal opinion from a source outside of the Ombudsman's office on the legality issue. That opinion, which is available and copies of it can be provided to any members if they wish, states quite clearly that no contract was formed; there was no legal obligation to renew.

I think it is fair to say that the report provided to the complainant by the Ombudsman first came to the committee's attention through a newspaper

article in one of the local papers, together with an editorial directed at ombudsman decision-making generally and this report specifically.

The subcommittee has met on two occasions with relevant persons within the Ombudsman's office to discuss what was done during this reinvestigation. The subcommittee has had the report available to it, has viewed and considered it thoroughly and wishes to report to you as follows.

It is apparent from both the face of the report and the information given to the subcommittee by the Ombudsman's office that the Ombudsman did undertake a reinvestigation. He did interview Mr. A under oath, giving him an opportunity to make any appropriate comment he wished to make concerning matters in the original report. I think that it is generally fair to say that the scope given to Mr. A during that examination was quite wide and with much latitude.

The Ombudsman's office did, as required, interview Mr. A's superior under oath. It is clear that that interview, again, was thorough and of wide scope. The Ombudsman's office did obtain an independent legal opinion from the law firm of Borden and Elliot on the issue of whether, given the circumstances of the renewal, there had been created a legal obligation on the part of the ministry to renew that contract. The opinion given is, as I said, thorough, and concludes that no legal obligation did exist; that there was no in-law contract of employment.

The Ombudsman did obviously revisit facts and circumstances of the investigation, both as ascertained in the initial go-around and as ascertained in this subsequent reinvestigation.

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The Ombudsman concluded in his report, as you will see at page 10 at the bottom, that the ministry, based on the circumstances of a meeting that is referred to in the body of the report, shall refuse to renew the two employment contracts. He forms that conclusion with the full knowledge of the other circumstances that are set forth farther in that paragraph. Accordingly, the Ombudsman was not able to, in the language of the committee in the Ombudsman's office, "support the complaint of the complainant." He was unable to describe the acts of refusing to renew the contracts as unreasonable, unjust, wrong or in any other way contrary to the Ombudsman Act.

The subcommittee, after extremely thorough deliberation, review of relevant matters and discussion has decided, and so recommends to the committee, that no further steps be taken by this committee. In specific terms, the initial request of Mr. A to appear before this committee and to address submissions to this committee on his wish to have this committee investigate the circumstances of his complaint, and ultimately to substitute the conclusion of the Ombudsman with its own, is denied.

The subcommittee wishes me to very strongly indicate its reasons, being that the committee should only in very extreme circumstances decide to substitute a conclusion of the Ombudsman with its own. Those circumstances would be where it was obvious as a result of a review of the matter that the Ombudsman had carried out the investigation incompetently or had failed to fulfil any or all of his responsibilities and duties under the Ombudsman Act, and where the conclusion, thereby, is so clearly and obviously not supported by any evidence or any principles of law. The subcommittee is unable to conclude that those circumstances exist in this case. It says that some may differ with the Ombudsman's conclusion, but difference of opinion or

conclusion alone is not sufficient in the subcommittee's view to warrant a substitution of opinion.

To do so in these circumstances would significantly undermine the Ombudsman process and that relationship to the Legislative Assembly through this committee. The recommendation of the subcommittee is that no further steps be taken, that Mr. A be advised that his initial request is denied, and that this matter, as far as the committee is concerned, be closed.

Madam Chairman: Any comments from the subcommittee on the report delivered by Mr. Bell?

Mr. Pollock: I just wondered why we were naming Mr. Shymko. I thought it was policy here to just state members from their ridings and not name any particular member.

Mr. Bell: I apologize. I only did that because it is a matter of public record that when Mr. Shymko raised the matter some time ago—it had to be some time ago; it was the previous parliament. When he was a member of this committee, it was not. I do not think the specific naming of him has compromised—

Mr. Pollock: I think if we are going to do it, we should name everybody or just name the member from such-and-such a riding.

Mr. Bell: I guess if I was really candid I would say the reason I named him by name and not by riding is that I did not remember the full name of his riding. I am now reminded that it was High Park-Swansea.

Madam Chairman: Mr. Lupusella moves that the subcommittee's recommendation be accepted by the committee without further debate.

Motion agreed to.

Madam Chairman: I would like perhaps to clarify on the record, for the sake of the member, that the current member for High Park-Swansea (Mr. Fleet) made a request to appear before the committee and express his comments about this particular case.

The subcommittee discussed this with the member and said that with the process here, it was most unusual and that he has an opportunity to express his comments, concerns and ideas on this case in the House when it is debated or in different forums that he has. We asked him if he would consider using those forums rather than appearing before the committee.

I did not want it to be seen as though the previous member for this riding was the only one who came before the subcommittee or the committee as a whole. We thank the member for respecting the process of the committee and for not insisting on coming before the committee any further.

Mr. Bell has something further about Mr. A.

Mr. Lupusella: May I make a comment about Mr. Shymko? I think it is proper for you, as the chairman, on behalf of the committee, to send a letter to Mr. Shymko emphasizing the feelings of this committee about his particular request and informing him about the position taken regarding Mr. A. It is a public relations approach, I think, that it appears to be—

Madam Chairman: I would be more than prepared to do that; and to the sitting member for High Park-Swansea, who has also expressed his interest in this particular case.

Mr. Bell: Before we leave it, I think that at the last opportunity to deal with this in public I should have something clarified.

Mrs. Meslin, there appeared in the December 5 edition of the Toronto Star a letter to the editor from Dr. Hill. You are familiar with the content of that letter.

Members, I should advise you I had a discussion with Mr. A yesterday. By the way, he expressed satisfaction with the manner in which the subcommittee and the committee had dealt with this to date. He stated that the committee had heretofore treated him fairly. I think in some terms, while I am sure he does not agree with the conclusion of the second report, he nevertheless recognizes an effort done.

Having said that, he expressed concern to me over the content of the letter as, in his mind at least, appearing to allude to facts or circumstances relied upon by the Ombudsman in coming to his conclusion, which were not part of the report. It may be a matter of just the wording of the letter or his interpretation of it, but, Mrs. Meslin, are you able to assure the committee and, through the committee, Mr. A that the other actions referred to on at least two occasions in this letter and the facts that surround those other actions are part of the Ombudsman's second report and are not something new, that heretofore has not been considered or disclosed?

Ms. Meslin: They are not something new. Anything referred to in the letter is part of the report.

Mr. Bell: Mr. A need not be concerned that there was, at least to his mind, a raising of other issues?

Ms. Meslin: No. You are correct

Mr. Bell: That is all, Madam Chairman.

Madam Chairman: Thank you, Mr. Bell.

1100

Madam Chairman: The second item on the agenda is the case of Mr. B.

CASE OF MR. B

Ms. Morrison: Mr. B is a very old case. It was reported in the Ombudsman's 12th annual report in 1985 as detailed summary 1. In the 13th report of the standing committee in 1986, the committee set out its recommendations with respect to the complaints of Mr. B and other home owners. These were home owners who had defects in their homes and whom the Ministry of Consumer and Commercial Relations had agreed, once the committee had so recommended, to compensate for these defects.

The home owners have been negotiating with the ministry ever since 1986 and there had been some question about whether this complaint had been satisfactorily concluded by the ministry. I am going to supply to the committee copies of letters from the ministry on the two outstanding cases that remain from among the various home owners who are requesting compensation.

Mr. B has withdrawn his further complaint. Several weeks ago he wrote to the Ombudsman suggesting that he was not satisfied with the final offer of the ministry. He has now confirmed to me that he does not wish to pursue the matter any further and that he is satisfied with the final offer from the ministry.

There are, however, two other home owners with whom the ministry is still negotiating. At the time of the discussion of this case by the committee, it was agreed that the ministry would be the arbiter of any differences of opinion as to compensation. The ministry now has provided offers to the two outstanding complainants. The offers were dated August 26. For one complainant, the offer is in the amount of \$19,426; to the other, in the amount, also, of \$19,426.

These two complainants have not responded to the ministry's offer and, so far as we know, the ministry has made every attempt to get a response. The last correspondence I have from the ministry is the November 8 letter to both of these complainants, asking them to please respond to the offer. This has not been done.

These complainants are apparently hoping that the ministry will compensate them for some damage which they feel will occur in the future but which has not yet occurred. Specifically, they have basement floors which they feel may, in the future, not stand up the way they should. The ministry has had engineering reports on both of these houses and is satisfied that there will not be future damage and is satisfied that its offer is a fair one.

I provide the committee with this information because the committee has asked whether this complaint has been, in fact, resolved. These two outstanding offers by the ministry to members of the complainant group are the only outstanding matters. As far as the Ombudsman is concerned, we are satisfied that the ministry is making every effort to resolve these.

Madam Chairman: All right, Ms. Morrison. Any comments from the committee?

Mr. Philip: Is it your intention to close the file until you hear from these two complainants?

Ms. Morrison: Our file is already closed because the matter was in the committee's hands. It was a committee recommendation that the ministry was attempting to implement. We have just received communications from the complainants, in particular Mr. B, and therefore have followed up to see whether the matter has been completed. We would not take any further action on this matter.

Mr. Philip: Have the other two complainants asked for a further adjudication by the Ombudsman?

Ms. Morrison: One of the other complainants spoke through Mr. B to us, saying they had not resolved their complaint with the ministry. They have not come forward themselves. Our information from the ministry is that they have not responded to the ministry's last offer. We are not prepared to take any further action, on that basis.

Mr. Philip: As you do not have a case before you, I do not see where there is anything further that we or you can do.

Mr. Bell: Ms. Morrison, you do not intend to do anything more, I take it, including following up with any of the remaining complainants or

Ms. Morrison: I believe our view is that the ministry has provided these complainants with suitable offers and the complainants not having responded to these offers, we do not feel we should follow up any further.

Mr. Bell: This committee cannot very well force those complainants to respond to or accept the offers.

Ms. Morrison: I think that is right. I think the ministry is rather concerned that it may be open to criticism because this matter has not been concluded, when in fact it has made every effort to get responses from these complainants as to their offers of almost \$20,000 in both cases.

Mr. Bell: It seems to me that there is nothing more this committee can do beyond expressing at least the Ombudsman's view that the steps taken by the ministry to implement the committee's recommendation have been, in the language of your act, "adequate and appropriate."

Ms. Morrison: I think that is correct.

Mr. Bell: If that is the committee's view, then it would be appropriate for the committee to close its file too.

Ms. Morrison: Yes, and I think Mr. Lewis at the ministry would appreciate some correspondence from the committee suggesting that the committee is satisfied with the report of the Ombudsman that the ministry's actions have been adequate and appropriate.

Mr. Lupusella: I was going to suggest that this committee direct the Ministry of Consumer and Commercial Relations to continue trying to settle the issue with the two complainants and that we are satisfied with the action taken by his ministry. I can move it in the form of a motion. That is the motion.

Madam Chairman: Anybody else then? All right; thank you, Mr. Lupusella. We will undertake to do that.

Mr. Carrothers: In adding to that, I just wondered if there is any way or if it is appropriate that the committee might correspond with these people and just say it is satisfied. I guess we do not know who they are, do we?

Mr. Bell: That would happen through the Ombudsman's office. As a matter of practice, when this committee decides to close its file on a matter, the Ombudsman will report that to the individual.

Mr. Carrothers: Just in case those individuals feel there might be more pressure brought on the ministry and are waiting for some other body to communicate.

Madam Chairman: It would be great if it is made clear to them that it would be an appropriate time for them to accept the answer. Thank you, Ms. Morrison.

Are there any other matters the committee needs to bring up before we go in camera? Seeing none, we are going to discuss our 17th report. We thank you very much for appearing before us this morning. Merry Christmas and happy holidays.

The committee continued in camera at 11:07 a.m.

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STANDING COMMITTEE ON THE OMBUDSMAN

CASE OF MRS. H
ORGANIZATION

WEDNESDAY, JANUARY 4, 1989



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Bossy, Maurice L. (Chatham-Kent L)
Carrothers, Douglas A. (Oakville South L)
Charlton, Brian A. (Hamilton Mountain NDP)
Cousens, W. Donald (Markham PC)
Henderson, D. James (Etobicoke-Humber L)
LeBourdais, Linda (Etobicoke West L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Clerk: Carrozza, Franco

Staff:

Wilson, Jennifer, Research Officer, Legislative Research Service

Witnesses:

From the Office of the Ombudsman:

Hill, Dr. Daniel G., Ombudsman

Meslin, Eleanor, Executive Director

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Wednesday, January 4, 1989

The committee met at 10:16 a.m. in room 151.

Madam Chairman: I would like to call this committee to order. This is the standing committee on the Ombudsman. My name is Cindy Nicholas and I am the chairman of the committee.

We have before us today Dr. Daniel Hill, Ombudsman for Ontario, Eleanor Meslin, executive director of the Office of the Ombudsman, Gail Morrison, director of investigations, and Elaine Buckstein.

For our agenda today, Dr. Hill has requested that he have a few minutes to discuss the case of Mrs. H, which we will be dealing with in our 17th annual report. After this, we have some organizational matters and then the committee will be going in camera to make its final review and draft of the 17th annual report of the committee. We have been dealing with this all year and hope to table it later this month.

Dr. Hill, do you have an opening statement?

CASE OF MRS. H

Dr. Hill: I do have a very brief opening statement regarding the case of Mrs. H. As we approach our last meetings together before I step down from my position as Ombudsman, we can look back on many productive decisions that have been made by this committee, decisions which, on the whole, have been most supportive of my role and have led to just conclusions to the work of our office.

Today, however, I feel I must respectfully ask you to reconsider one of your decisions, a decision which I feel results in hardship and injustice and which I believe you could remedy.

In August, we presented to this committee the case of Mrs. H, a widow who was denied survivor pension benefits because she married her late husband after he had retired. You agreed with me at that time that Mrs. H was being treated unfairly and you made a recommendation that you felt would rectify that unfairness. At your meeting on November 23, 1988, you considered the ministry's response to your recommendation. The ministry, although it assured the committee that it had made every effort to comply with your recommendations, found itself unable to do so.

My staff suggested an alternative recommendation which would make it possible for Mrs. H to receive the equivalent of her pension benefits. The committee voted not to amend its recommendation but instead to await the outcome of a review of pension policy now under way by the ministry.

I am disturbed by the committee's decision in this case and feel I must make my concerns known. Mrs. H is an elderly woman. She is sick. She is infirm. Policy reviews are lengthy and complex and any resulting change in legislation is almost certain to come too late to benefit this individual.

The committee has often expressed its concern that individual

complainants not be left without a remedy when a decision has been rendered in their favour, but in this case it has accepted a delay which may ultimately deny Mrs. H justice completely.

I believe the ministry was honest in its attempt to implement your recommendation and would welcome a recommendation which could be implemented. I therefore urge you to reconsider, if possible, this important case. To assist your reconsideration, you may wish to review my original recommendation with respect to Mrs. H's entitlements. It read as follows:

"The Minister of Education, in conjunction with any other governmental organization he deems necessary, issue an ex gratia payment to Mrs. H as soon as possible, effective from the first day of the month following the date of her inquiry for same, until the amended provision is in force. Such a payment can be made by providing for it through the annual budgetary process, so that no question will arise as to the authority of the ministry to make the payments. Also, I recommend that payments be made to any other surviving spouses who have been denied a full dependent or survivor allowance by the Teachers' Superannuation Act or the Teachers' Superannuation Act, 1983, payable from the first day of the month following the date of their request for a benefit as a result of my recommendation."

But now I am essentially concerned with Mrs. H. In my view, it is essential that the ministry be given the opportunity to demonstrate its good faith, and that the window of fairness and our processes not be rendered useless by unnecessary delay.

Madam Chairman: Thank you, Dr. Hill. Do we have any comments from the committee?

Mr. Philip: My only comment would be that if those of you who were in the House yesterday and not in committees or other duties during the estimates of the Management Board listened closely to that minister's comments, you would see that pension reform is a long way away.

Certainly it would appear that negotiations have bogged down and that there will be an extensive dialogue between the Treasurer (Mr. R. F. Nixon), the Chairman of Management Board (Mr. Elston) and the various representatives of employees. There was nothing which would give anyone any confidence that that was something which was going to take place in the very near future if you listened to the minister's statement.

I think we all agree on the basic merits of the case. The issue, then, is how to bring about the payment. If you follow the route of waiting for the reform, which is clearly a long time away, what you are doing is denying justice to this person, because she may well not live to gain the benefits from our decision.

I suggest that we accept the position of the Ombudsman and consider that what he is proposing is a way of achieving the objectives we all basically agreed with in principle, but the process that we have chosen will not work out in practice and we should accept what the Ombudsman has recommended.

Mr. Lupusella: I appreciate the comment of the Ombudsman. My remarks apply to the statement made by the opposition member. I think the recommendation the committee made in relation to Mrs. H does not have anything to do with pension reform.

I think the decision taken by the committee was to refer the case to the working group. The working group eventually will have the power, as the minister has suggested in his letter, to meet the demands of Mrs. H. I think the statement made by Mr. Philip, to wait for a change of the law on the issue of pension reform, is completely out of order. Of course, I would like to remind the committee members that unless I am mistaken, the decision taken by the committee in relation to Mrs. H was taken in camera. Am I correct? No?

Madam Chairman: No. The actual deliberations were taken in camera in August, but the actual recommendation was on page 17 of our draft report and was done in this very room. The discussion that ensued is not in Hansard.

Mr. Lupusella: In concluding my statement, I think that if we are to meet the proposal being suggested by the Ombudsman, the ex gratia payment would be applied in the case of Mrs. H. That particular position will be used as a precedent for other cases affecting other ministries which will not have the power under the law to meet the committee's recommendation, and I would not like to see this case as a pattern to be used for future cases. That is the only reservation which I have in relation to the recommendation which you made to reconsider the case of Mrs. H.

Dr. Hill: I think there would not be a precedent. I think it has been done before. I think the Ministry of Education has itself done it before and I do not believe it is a precedent. I am just deeply concerned about that particular person's fate and her age and her infirmity and the fact that there is no remedy. We have agreed to the principle of the thing; we have agreed to do something for her; but then in agreeing we have ended up not doing anything for her.

It is not a precedent. As I recall, my counsel tells me that it has been done before. We can cite the situation in which it was done before and I do not think it is a precedent, Mr. Lupusella, I really do not.

Mr. MacDonald: Madam Chairman, I would certainly support Dr. Hill's suggestion and Mr. Philip's suggestion that time is certainly of the essence here. This lady is elderly. She has been deprived of certain reimbursements and I would certainly support it wholeheartedly.

Mr. Philip: The only point I wanted to make is that the working group is a policy-making group. It was not set up to deal with a specific case, Mrs. H's case or any other case. Its report will not come down until such time as the policy and the new legislation does come down. Therefore, if we are waiting for that, it is fairly clear—I have not spoken to the Treasurer, but certainly I have spoken at some length to the Chairman of the Management Board—that the pension reforms are quite a ways away.

I know that some of you talked about our earlier solution afterwards and had some second thoughts about that decision. I ask that you reconsider it out of compassion. There is a principle of justice. If you agree—as you did agree; as we all agreed, and I resent the use of the word that the "opposition" decided; in this committee, as in the standing committee on public accounts, there is no opposition, there are no government members; we are all supposed to be operating in a nonpartisan way—that this woman had an injustice, then we have to find a way of curing that injustice.

If the way we have proposed does not solve the problem, then I think we have to have some flexibility and look at ways that do solve the problem. It is fairly clear, unless by some good faith of God or nature this woman lives a

lot longer than one would expect someone of this age to live, that there is an injustice. Let's get on with it and get this out of the way so that we do not have to deal with it again. We have so many other things before us.

1030

Mrs. LeBourdais: I really feel that I personally would like to support Dr. Hill's request. I realize that it presents some difficulty, but I think this becomes a case of a situation where you have to go to bat for one, single individual. I would certainly vote in support of that.

Madam Chairman: I would like direction from the committee on how we should deal with this. We will be discussing our draft report in camera, following this portion of the meeting. I wonder if perhaps at that time we should discuss whether we should adopt the recommendation of Dr. Hill or not, or vote on it at that time. Or shall we do it now? I would like some direction.

Mr. Philip: Why do we not do it now? I think a majority of people agree with Dr. Hill. We can simply announce publicly what our decision is on this. Judging from the way that people have talked, if there were a vote taken right now—and we have not heard from Mr. Bossy—I suspect that the Ombudsman's recommendation will carry. That has already been indicated publicly, so why go in camera for something that is now publicly on the record?

Madam Chairman: You are suggesting that we adopt it now?

Mr. Philip: Dispose of it, yes.

Madam Chairman: Any other alternatives?

Mr. Bossy: I feel very sympathetic towards this case. But we, as a committee, did make a decision. If you remember, we made a recommendation originally and then we amended that recommendation, indicating that the committee direct the working group—that was brought up again here—which was set up to deal with the issues of pensions and related policy.

We specifically indicated in our recommendation that this working group, as set up by the minister, would deal with the issue of Mrs. H's pension and the general issue of pensions. We specifically indicated Mrs. H, thereby directing through the minister to the working group to deal with that issue. I would like to see a report from that group on that issue. Why we went through all the discussions to come up with a further recommendation, I do not know. We wasted some time somewhere.

I am reluctant at this time, as sympathetic towards the case as I am, and I say this sincerely—to see us come to a point of maybe setting a precedent again. I say "maybe" here, and it could very well be, because it could open up retroactively; these things seem to be happening in a more retroactive nature. Some people will come back on decisions that were made in the past. I would not like to see that.

I would like to see a decision, because it should become part of the policy on pensions, to deal with the very specific case that we happen to have before us—Mrs. H—or similar cases in the future. Right now, as sympathetic as I am towards this single case, I would not be able to support that. I would like to see the report of that working committee. Otherwise, we would have to withdraw what we have ordered through the ministry to accomplish what we wanted to have done.

Madam Chairman: If there are no objections by the committee, I would ask that we vote on the original recommendation on page 4 of the Ombudsman's presentation to us today. It is outlined there. That would be effectively added to our draft report. I do not see that there is a necessity to eliminate recommendation 5 on page 17 of our draft report, because I think that could stand collectively with this recommendation as well, because it would also direct it to this issue. Indeed, we would be adding the original recommendation of the Ombudsman from our August sessions.

Could I have a motion to vote on this recommendation?

Mrs. LeBourdais: I so move. Do you need a seconder?

Mr. Philip: No, you do not need a seconder, but I will second it to prove that it is nonpartisan.

Madam Chairman: Is it acceptable to the committee that we vote on this at this time?

Mr. Philip: Yes.

Madam Chairman: Nobody wants to get any other members? All those in favour of the recommendation that is put forth on page 4 of the Ombudsman's presentation? Four. Those opposed? Two. The motion carries.

Thank you, Dr. Hill, for coming before us today. When we are in camera, we will add that to our report and we will be tabling that later.

Mr. Philip: What is your advice, Madam Chairman, in advising the Ministry of Education of our decision, since we have done this publicly now?

Madam Chairman: I think, since the document will become public within two weeks, we will make special effort to send it to them at that time, if that is acceptable.

Mr. Philip: I just thought, as a courtesy, it might be worth while that the clerk could at least advise them today of the decision.

Madam Chairman: Any objections to that?

Mr. Philip: I just think it would be inappropriate for a reporter who may be watching to suddenly hit the Ministry of Education with a question without its being advised by our clerk immediately of our decision. I think they should be tipped off; otherwise you will catch them by surprise. I am just asking that the clerk advise them.

Madam Chairman: If that is acceptable to the committee, we can certainly do that. Okay. The clerk will undertake to do that.

There were some organizational matters which the Ombudsman's office wanted to present for the committee at this time.

Mrs. Meslin: Yes, we just have an informational matter and a request. As you know, we request time from the committee to look at our special reports and we have two, possibly three, special reports to come before this committee, but we do want to inform the committee that Dr. Hill's last day will be March 10 and we would urge the committee to make time to hear these special reports before he leaves for his retirement. They are important

and we just ask that the committee look at those issues and also be aware that we have not yet discussed expanded jurisdiction.

Madam Chairman: How long do you think the discussion of the special reports would take, given our normal course of dealing with them?

Mrs. Meslin: We assume that one of them, which is a major one, will take two days and if we have two more, we would need two more days. That is a possibility of four days, maximum.

Madam Chairman: We will try and request one week from the House leaders, preferably during the month of February if we have adjourned by that time, so that we can deal with these issues before February 25, Mr. Philip, so that you can be in attendance.

Mr. Philip: February 26, actually.

Madam Chairman: Oh, is it February 26, 1989?

Mr. Philip: There will also be a week of briefing in that committee before that, so you might want—since your presence then will be greatly appreciated in the standing committee on public accounts, as will mine I assume—to look at the first or second week in February in the event that the House has adjourned, judging from the closure statements of the Premier.

Madam Chairman: We will make special effort, given that Dr. Hill will be retiring on March 10 and that he is knowledgeable in these cases and they are very difficult. Any further matters, Mrs. Meslin?

Mrs. Meslin: No, that is all. Thank you.

Madam Chairman: When will you be tabling the special reports?

Mrs. Meslin: One of the reports we had hoped to be able to table within the next week or so. We have been trying to get the ministry to respond to us and it has not been responding, so we are a little bit up in the air; but we hope within the next couple of weeks.

Madam Chairman: You will keep us apprised of it just in case there is no need to have the time?

Mrs. Meslin: Yes.

Madam Chairman: That is great. I think that is all we have to deal with in the Ombudsman's office at this time, unless anybody has any comments which require the Ombudsman and his staff. Seeing none, thank you very much.

ORGANIZATION

Madam Chairman: Before we go in camera, I just want to set out what our agenda will be for the next couple of weeks.

Dr. Hill will be presenting the estimates of the Ombudsman's office for us next Wednesday, January 11. I would suggest that we devote the following weeks to the issue of expanded jurisdiction. We had the public hearings and we have an opportunity to have perhaps three weeks in a row where we can deal with this issue and have some very interesting discussion on the expanded jurisdiction issue. That is our plan for the next month. We appreciate your coming before us today.

Is there anything further that committee members have that they want on the record before we go in camera to discuss our draft report?

Mr. Philip: I would ask that perhaps the chair circulate to members of the committee the Provincial Auditor's last report concerning the hospital issue. Basically, what he is saying is that complaints about treatment in hospitals are not being dealt with. That is one of his concerns. I think it is interesting additional information concerning the argument that the Ombudsman be given extra jurisdiction over the hospitals.

Madam Chairman: Not to overload the committee with paper, but I think it would be a good idea to condense a small package, a summary report drafted by Jennifer Wilson of that document to which you refer from the Provincial Auditor's report and a variety of other material, a good synopsis presented together so that we can come together with a lot of material.

Mr. Philip: I have a summary of that section, and you can get it. I am pretty sure we have a summary.

Madam Chairman: Seeing no further discussion, we will adjourn until next Wednesday and go in camera or whatever it is we do.

The committee continued in camera at 10:42 a.m.

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STANDING COMMITTEE ON THE OMBUDSMAN

CASE OF FARM Q

TUESDAY, MARCH 28, 1989

Morning Sitting



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Bossy, Maurice L. (Chatham-Kent L)
Carrothers, Douglas A. (Oakville South L)
Charlton, Brian A. (Hamilton Mountain NDP)
Cousens, W. Donald (Markham PC)
Henderson, D. James (Etobicoke-Humber L)
LeBourdais, Linda (Etobicoke West L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitutions:

Cureatz, Sam L. (Durham East PC) for Mr. Pollock
Farnan, Michael (Cambridge NDP) for Mr. Philip
McCague, George R. (Simcoe West PC) for Mr. Cousens

Clerk: Carrozza, Franco

Staff:

Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon
Wilson, Jennifer, Research Officer, Legislative Research Service

Witnesses:

From the Office of the Ombudsman:

Meslin, Eleanor, Acting Ombudsman
Morrison, Gail, Director, Investigations
Lee, Dr. Allan, Investigator

From the Ministry of Agriculture and Food:

Dombek, Carl F., Director, Legal Services

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Tuesday, March 28, 1989

The committee met at 10:13 a.m. in committee room 2.

CASE OF FARM Q LTD.

Madam Chairman: I call the meeting to order. Welcome to our committee. Today we are dealing with the Ombudsman and Farm Q Ltd. Are there any preliminary matters not about the case that the committee would like to put forward before we commence? None?

We are just getting additional binders for those who have not got them in front. We expect those within the next 10 minutes.

I think at the outset I should welcome our new Ombudsman for the proceedings, Eleanor Meslin. We all saw the retirement of Dr. Hill just a few weeks ago. We are sorry to see him go, but are very pleased that you are following in his footsteps. You are aware of the case and, I am sure, will take on the task with zest over the next short while or however long you are in the position.

What I would suggest that we do in terms of format is, for those committee members who are not familiar with the format of material that we do receive, that Mr. Bell go through that briefly and just outline what you should be focusing in on. Then we will ask the Ombudsman to make an opening remark and commence the case. If there is no opposition to following that procedure, I would suggest that Mr. Bell start.

Mr. Bell: Members of the committee, and particularly those who may not have a great deal of experience in this committee process, let me say at the outset that what you are going to be doing over the next three days is, with one exception, identical to that which you have done many times in the past. You will consider a report of the Ombudsman where he has made a recommendation to a governmental organization to do something and the governmental organization has, for stated reasons, declined to do so.

Pursuant to your terms of reference and the Ombudsman Act you, on behalf of the Legislature, will during these hearings hear from the Ombudsman and her staff as to the circumstances of the report, being the specific complaint that was addressed to the office, the investigation undertaken in respect of the complaint, the findings made as a result of the investigation, the conclusions formulated and, last, the recommendations made. You will then hear, after the Ombudsman's submission has been completed, from the appropriate representatives of the Ministry of Agriculture and Food as to the reasons why the ministry has declined to implement the recommendation.

You as a committee, pursuant to your terms of reference, must decide whether the Ombudsman's recommendation is to be supported and so recommended to the House for adoption or whether, and I guess it is useful to borrow some phraseology from the Ombudsman Act, the ministry's position is an "adequate and appropriate" one and therefore whether you will report to the House as to reasons why the Ombudsman's recommendation is not to be supported.

I would like to introduce you to some matters before we begin formally,

because I think if you get an overview of certain things and people and material, it will be easier to follow matters as we proceed. First, assisting you today, already introduced, has been temporary Ombudsman Eleanor Meslin. Mrs. Meslin, you will be assisted today by two members of your staff. Could you introduce them for the record, please.

Mrs. Meslin: Yes, Gail Morrison, who is sitting behind me, our director of investigations, and the investigator on the case, Dr. Allan Lee.

Mr. Bell: Seated to your left, representing the Ministry of Agriculture and Food, is the director of its legal services branch, Carl Dombek. Mr. Dombek, I understood you were going to be assisted by other members of the ministry today and for the next two days. Is that the case?

Mr. Dombek: Yes, that is correct.

Mr. Bell: They are just catching up to you, are they, or are they already here?

Mr. Dombek: One is here and others will be attending tomorrow.

Mr. Bell: Are you carrying the ball for all of today?

Mr. Dombek: I believe so. Perhaps I should introduce Dr. James Pettit, who will be here right now and will be assisting this afternoon, if we get into the ministry's case.

Mr. Bell: Who else will be assisting you over the next two days?

Mr. Dombek: Dr. Brian Kennedy, who is a professor at the University of Guelph, and possibly Dr. Ron Urquhart. I am leaving Dr. Urquhart as a possible, because it is really up to the committee whether it wants to hear from him or not.

Mr. Bell: Before I refer you to the material, just let me say, in a very general sense and not intended to bind the parties or the committee on what this case is all about, that some of the facts and some of the evidence in this case can be complex, can be scientific, can be technical. The real issue, though, that I think is before everyone and the issue you will have to address and make a decision on is, in my opinion, not so difficult.

The complainant that came to the Ombudsman purchased a number of pigs for its specific purposes. Its complaint to the Ombudsman and as carried forward through the Ombudsman's report is that the complainant relied heavily on certain data that emanated from the ministry. I think quite simply the complainant's position is, "But for that data, I wouldn't have bought." The data turned out to be inaccurate, the inaccuracies were subsequently discovered and the complainant, through the complaint at all material times, states that it has lost money as a result of the purchase which it would not have done but for that data. I think, in simple terms, that is the thrust of the Ombudsman's case.

Mr. Lupusella: How much money?

Mr. Bell: I will get to that in a moment. Both sides will speak for themselves.

The ministry's position is probably equally as simple, although it

relies on a number of grounds in support of it, that the data were not the cause of the purchase. In any event, if they were, they should not have been, because certain cautions were made known to the complainant at all material times. In any event, the ministry says no loss has been suffered or, if a loss has been suffered, it was not caused by the ministry but was caused by others, particularly the complainant. I guess the usual phrase is, "Circumstances beyond our"—i.e., ministry—"control."

You have got to decide, in the circumstances of the Ombudsman's recommendations and findings, which of those positions is the one to recommend to the House.

I should tell you in advance, and commend the parties, that there has been some effort undertaken by them before meeting with you today to simplify and streamline matters as much as possible. One of the matters that the parties have agreed to, with my urging and with the hopeful agreement of this committee, is that your first order of business will be to determine what the lawyers call liability; i.e., the question of whether the is ministry obligated to compensate the complainant for any losses that were suffered or losses suffered, if any.

Once you determine that question, then the question can be addressed as to what are the losses if any or, more important, how should those losses be determined. I have had some discussions with the parties before this morning, and let me tell you what I have urged them to consider. I think within the next three days, they will be able to tell us what their positions are and I will be asking you to make a decision.

1020

Depending on your decision on the liability question, if it is determined in favour of the Ombudsman's position, I will be urging you to consider a recommendation that the parties go to another forum to have the damage issue determined, whether that be by private arbitration or by a phenomenon which is growing in Ontario legal circles called rent-a-judge, or some other means of determining probably the most difficult issue in this whole case, that is, the damage issue, if any. That way, the committee does not have to embroil itself in something that frankly it has never done before, that is, an assessment of damages. It is probably something that should be referred elsewhere.

That being the case, you do not have to occupy yourselves to any significant degree with the question of how much is the loss and less so with the question of whether a loss has been suffered, although you cannot completely divorce yourselves from that last issue, for reasons which I will indicate to you later.

The other matter the parties have discussed with my assistance is the question of a common synopsis or a common statement of facts and issues. I am pleased to report to you that the parties have accomplished an awful lot in that regard. What I will show you in a minute in the material is a common synopsis which sets out what the parties agree is the issue of the complaint; what the parties agree are certain relevant facts—not all of them, but certain relevant facts—to this case; what the parties agree are their respective positions, i.e., the position of the ministry is set forth and the Ombudsman acknowledges: "Yes, that's your position. I don't agree with it, but I acknowledge that that's it." So there is no uncertainty before you. Likewise, there is an acknowledgement of what the Ombudsman's position is with

respect to the issues.

I think you will see as the days unfold that a lot of time will be spent referring to this synopsis, so it is one of the key documents for you to refer to as we proceed.

Mr. MacDonald: May I ask a question? What is the time element on the decision as far as dollars are concerned? What are we talking? Another year, another two years? The case has been ongoing for a number of years now. What are we talking in time if we go that route?

Madam Chairman: I think we should not discuss the alternatives at this point, and perhaps even the specifics of the case, synopsizing them so quickly at the beginning. It is a bit unfair. Maybe we could head on to the format of the book and the deliberations and get back to these later. I think that is a valid question, but perhaps tomorrow, not today.

Mr. Bell: You all should have before you a black volume, which is the volume of material submitted by the Ombudsman. In the material, at the outset, you will find a table of contents. On the left-hand side it refers to certain tab numbers. Over the course of the day, the clerk will be assisting you to insert tab numbers in the appropriate locations. You will see on the right-hand side that the documents as described are given page references, so you can follow along quite easily.

In the main, this material contains the key documentation that passed between the Ombudsman's office and the ministry. Much of it goes to the procedural requirements the Ombudsman follows under his act, with the various letters, subsections 19(1), 19(3) and so on. Much of it deals with the content of the various positions. All of it is to be used by way of background by the Ombudsman, Ms. Morrison and Dr. Lee as they take you through their submissions.

I think in terms of documents that you need to mark readily are the ones found at page 4 which is the synopsis. If you would turn to page 4, you will see that there is really a nine-page document that the parties have prepared. I am not going to refer to it specifically now. I know Ms. Morrison, as she starts, will take you through it. I commend it to you for a further review at your earliest opportunity.

The other document which I think you will be spending the most time with, at least as far as the Ombudsman is concerned, is that found at page 207. That is the report itself of the Ombudsman which runs for some eight pages in length. I know Ms. Morrison will be making very specific detailed reference to that as we proceed.

That is the Ombudsman's material. The clerk of the committee had delivered to him a week ago Wednesday, March 14 or 15, five volumes of documentation from the ministry. The covering letter was that the ministry's intent in this was to have what they believe to be all the relevant documentation before the committee for its use as the committee deemed appropriate. The ministry—this is Mr. Dombek's covering memorandum—also said that it was not the ministry's intention to refer to all of the documents but some of them would be referred to.

As I understand it, the reference will be made to the documents in an effort to explain or supplement, if you will, the ministry's position on why it is not going to accept and implement the recommendation. The ministry understands that this committee does not conduct a reinvestigation of matters

or an investigation on its own of matters, but of course has in the past and will in the future receive documentation that the parties believe may be of assistance.

You should not be alarmed by the volume of the documentation because much of it is background and available for you as you may wish to review it and as the parties may wish to refer to it. But it is not, certainly in my view, required for memory work or distillation before you can address this case.

I think that is enough for me at the outset, just with one last exception—I think both parties have made this request and I have discussed it with the chairman: Because of the number of factual and other related issues of this case, the parties would be greatly assisted if they could go through their submissions without interruption. In the circumstances of this case, I think that is a preferable way to proceed.

If you concur, after Mrs. Meslin makes her opening remarks, Ms. Morrison will then take you through the Ombudsman's position and your questions can then wait upon her completion. If it is acceptable to the committee as a usual format, I can follow up at the end with questions after committee members have completed theirs. If there are no further questions, Madam Chairman, I have nothing further at this time.

1030

Madam Chairman: If that course of action is acceptable to the committee, I will not entertain questions until Ms. Morrison has finished. If you are departing from that for a reason, please indicate so. Mrs. Meslin.

Mrs. Meslin: I would like to thank you for your kind remarks at the beginning of the session.

Members of the standing committee, I am delighted to come before you as the temporary Ombudsman. As you will have noted from the voluminous materials that have been provided to you, this case is not a simple one. It relates to some very technical matters and the former Ombudsman, Dr. Hill, has had the assistance of experts in coming to his conclusions and recommendations.

This does not mean, however, that the issues you must decide are technical. They are issues like those with which you have successfully grappled in many earlier cases. You must decide in this case whether the ministry's response to the former Ombudsman's conclusions and recommendations is an adequate one, and if it is not, you must make recommendations accordingly.

This is a classic Ombudsman case, a case in which the actions of the ministry have affected a complainant in a serious way. The complainant brought this matter to the Ombudsman's attention rather than pursuing legal action against the ministry, as is his right. Although the details are complex, the issue before you is not. You must decide whether the actions of the ministry were such that the complainant was misled into making a decision that resulted in financial losses.

If your opinion is that the ministry should bear some responsibility for these losses, then some compensation should be paid to the complainant. The amount of compensation that may be appropriate is a difficult question. Since the ministry has never agreed to its liability, no discussions as to the

appropriate amount have been held between us. Therefore, if you agree that compensation is owed, the amount will have to be determined through further review. Arguments regarding the manner in which compensation should be determined can be made to the committee by the ministry and our office at a later time.

However, if you think the ministry's position is fair and that its actions do not imply any liability for the complainant's losses, no further review regarding compensation would then be necessary.

This complaint has required a long and detailed investigation, partly because of its complexity and partly because we had hoped at many stages of the investigation that a resolution might be possible.

In the end, the Ombudsman was convinced, as he hoped you would be, that the complainant indeed suffered a financial loss through the actions of the ministry and that he should be compensated. The director of investigations, Gail Morrison, and Dr. Allan Lee, the investigator in this case, will now present the details of the investigation to you and answer any of your questions.

Madam Chairman: Thank you very much for your opening remarks. Perhaps Ms. Morrison could come forward. I have been warned about Pandora's box.

Ms. Morrison: Just trying to frighten you.

Good morning, committee members. As both Mr. Bell and Mrs. Meslin have said, this looks like a very complicated case. The documentation is voluminous and the investigation took a very long time. I believe they were also correct, however, in telling you that the issues of this matter are very straightforward and simple. Once you get behind the technical questions, the issues are ones that you have dealt with in many cases before.

It is an issue where we have a government program set up for a specific purpose that was then relied upon by the complainant to his detriment. The program has technical aspects I would like to try to explain to you in fairly simple terms. I apologize if I seem to oversimplify or if I am telling you things you already know, but many of the details of the case are fairly technical and are quite important to your determination.

I will begin by describing the complainant. The complainant is a corporate entity, Farm Q, that raises pigs for breeding purposes. It seems rather a simple point, but it is quite important you understand that this farm wanted to raise pigs to sell to other farms for raising pigs. They were not interested in raising pigs to sell to the market for slaughter. That point will be coming up again and it is important for you to keep it in mind.

The complainant is a corporate entity, but of course you have dealt with corporate entities here before. I think you will remember the long-standing case with the Ministry of the Environment that was just settled at your last sitting, in which a corporate complainant was involved. In any case, reference could be made to the British Columbia Development Corp. case in the Supreme Court of Canada, in which the Supreme Court made it clear that ombudsmen's offices can entertain complaints from corporate complainants.

The program that is in question here is referred to as the record of performance program, ROP. This program was set up by the federal and

provincial governments together. The purpose of the program, as you will note in your synopsis—you can follow this along at page 4. The program was set up in 1967 with co-operation between the two levels of government. The program was intended to improve the development of swine stock in Ontario and to assist farmers in doing that. The part of the program that was taken care of by the Ontario Ministry of Agriculture and Food, which is referred to in the document as OMAF, was what was called the home test component.

In order to understand what this program was about, you have to know a little bit about pig breeding. I started out knowing nothing at all about pig breeding, and having read all of these documents, I now know a little bit about it. I will just tell you what I know, which is not very much, but it will help, I think.

In order to breed the very best possible kind of pigs, what you would like is that they will grow fast and that they will not be too fat. I had always thought that fattening pigs for market was a very good idea and you wanted them to be as fat as possible, but that is not true. What you really want is a pig that grows fast; that is, reaches a certain weight relatively quickly, but is not a fat pig. In other words, they are in good shape. They have been to the physical fitness club every day and they are big and strong, but not fat.

The reason for the program was to be able to test pigs to see whether they were in good shape and fast-growing. The two things that were measured in the program were the time it took to reach a certain weight—that is called the time to 90 kilograms, but it just tells you how fast the pig grows—and the thickness of the fat on the pig. This is called the back-fat thickness.

It sounds quite cruel to go around probing pigs to see how fat they are, but in fact what they used were ultrasonic probes. This was a measurement that was made by a ministry technician. In the home test program, this ministry technician went out to the various pig farms, measured the various pigs for back fat and weighed the various pigs so they could calculate what was called the ROP index.

"Index," again, sounds like a fairly complicated word, but it was just a combination of how fat the pig was and how fast it was growing. What you wanted was a high index. We wanted a pig that was relatively lean but grew relatively fast. The way those numbers were combined led to an index that told you how good the pig was.

1040

More important than just knowing how good any individual pig is, what you would really like to know is: If you breed that pig, will you also get good pigs? The record of performance index was valuable for that aspect. It did not just tell you that you had here a very good pig. What it told you was that this pig was genetically good for thinness—low back fat—and fast growth. There was no way to manipulate the data—the growth rates and the back-fat thickness—so that the index would be good unless the pig was genetically sound.

There are of course a lot of things that affect how fat and heavy a pig is, but you could feed them more, feed them a lot, and feed them very rich food and they would grow very fast. They would get to their 90 kilograms very quickly. But if you did that, they would turn out to be fat. If you try feeding them less, however, you have to be a little careful, because you are

interested in how fast they get to the weight in order for them to have a good index. If you do not feed them enough, then they would end up being very slow getting to the necessary 90-kilogram weight. The idea of the ROP statistics was to be able to measure the quality of the pig for these particular characteristics.

You should understand right at the outset that the ministry agrees that its technicians made the measurements and the ministry agrees that there were errors in the measurements. There is no question on the part of the ministry that these errors occurred.

Let's get back to Farm Q and what happened to Farm Q. As I emphasized before, Farm Q wanted to set up a breeding unit. They wanted to set up a unit where they could raise superior breeding stock. They started to look around, and they said, "There are a number of things that will make a superior breeding herd." These things include excellent health status; these have to be healthy pigs. They wanted registerable pigs. Registerable means pedigreed pigs. They wanted pigs that had papers, essentially. They wanted these pigs to be physically healthy and they wanted them to be lean and fast-growing.

They started to look around for a place to get these pigs. They knew of a number of high-health-status herds. One that is mentioned in your synopsis is the University of Guelph herd. So they asked about whether there were pigs for sale there. They looked at a number of other herds. In looking at these herds they looked for pedigree, health status; they looked for physically sound pigs and they looked at the ROP statistics to tell them whether these pigs were lean and whether they grew fast.

When they were doing this they found a herd, in your materials called herd 1, in which these ROP statistics were excellent. They looked at them again, because the ROP statistics were so good that Farm Q felt these pigs could not have such good ROP statistics if they were not superior pigs, superior in genetic stock. They then said if they could get such superior pigs they could go ahead and build their unit, which requires a great investment of money, which is where we come to losses later on in our discussion.

In setting up this unit a number of things have to happen. They cannot just take the pigs from herd 1, bring them home and breed them. That is not the way they do things in the modern pig-raising world, as I have learned. What they have to do, in fact, is set up a special place for these pigs, because in order to maintain this high health status they have to bring the pigs in from a high-health-status herd and they have to put them into sterilized conditions.

They have to take a place where they are going to put these pigs. They have to clean it out. They have to sterilize it. They have to leave it for a certain length of time to make sure that anything that is going to grow, grows, and sterilize it again and generally prepare a very careful home for this new herd. In doing this, obviously they used some space they could have used for other things. But what they wanted to do was establish a very high standard, a superior herd, of breeding pigs.

As I say, when they looked at herd 1, it looked fabulous. It had just an excellent record of performance statistics. In fact, there is no question the ministry agreed this was an excellent herd. It was an excellent herd, but it was not the superior herd that its statistics suggested. The reason for this became apparent once the pigs had been delivered. One of the reasons this came out—the story is a little unclear at some points—is that Farm Q was

concerned that one of the technicians probing the pigs was himself a pig farmer. Because they were very anxious to protect these pigs from any possible health problem, practically like putting them in quarantine, they asked for another technician to probe the pigs. When the other technician probed the pigs he got very different results from the results the first technician had got over at herd 1.

This made Farm Q begin an investigation. When it investigated it found that four or five months before, the ministry had also discovered there were errors in the ROP program. The ministry had discovered it in a different way. The ministry had a technician who went around to the farms and probed the pigs to see how fat they were. He went on vacation and someone else went along to probe the pigs he had usually probed.

When that happened, it turned out that the results of the probing were quite different. Again, I should emphasize there is no question that the measurements were wrong. The ministry agrees that the measurements were wrong. Any disagreement we have with the ministry is as to the effect of the wrong statistics.

The plan, then, for Farm Q was to choose the pigs from herd 1, have them bred and move them to their new unit 6, their new happy home. Farm Q, prior to finding out that there were any problems with the statistics, in ordering its pigs took a list of the indices, a list of the various ROP statistics for the herd, and sent its farm manager over to inspect the pigs. In inspecting the pigs, he said, "I would like to see the pig with the best index and then I would like to see the next one, and so on."

The reason to look at the pigs is that they were not just interested in ROP. They were interested in other things as well. They would not buy a pig that was very lean and very fast-growing, but crippled in some way. They wanted healthy, sturdy pigs: what was called pig—I think they said—"good conformation," if you see those words in your material. They wanted a pig that was healthy, sturdy and not deformed in any way.

The manager went to herd 1, and starting with the best-indexed pig, he looked at the pigs. He looked at every single one of them. He rejected those that had poor physical characteristics. He said, "I don't want that one." He then specified which pigs were to be bred as purebreds and which were to be bred as crossbreeds, and this is a very important point.

He had the pigs. He knew which ones were the highest indexed pigs and which ones were the lowest indexed pigs. He then said: "This is the way I want them bred. I want higher ones bred for purebred and lower ones bred for crossbreeds." The reason that is an important point is it could turn out that all of the pigs he got were very high-indexed and that it did not matter that the indices were mixed up; that is, that ones that appeared to be very good were not quite as good because they were all very good pigs. That could happen and that would not matter.

1050

But it does matter if you then try to put the pigs together in some order. It is very much as if you were trying to choose a team for a particular quiz and you have a lot of people, some of whom are very good at the quiz and some of whom are not very good, and you want to pick out of that the very best team. If the marks you have for those people as to how good they are at the

particular subject are all mixed up, then you might pick two people who are very poor at this particular subject rather than the two best.

So what you will see in the materials is a lot of talk about ranking. Ranking means exactly this problem; that is, not only do you have to know which pigs have As, so to speak, but you have to know which one has 96, which one has 95, which one has 94, etc. It is not good enough just to say, "I'd like smart, lean, fast-growing pigs."

This created a problem for Farm Q, because the ranking was wrong. The wrong pigs were bred with the wrong partners, and instead of getting the two best ones, you might have got the best one and the worst one or you might have got two in the middle, but there was no way of telling that, because the statistics were wrong. You did not even know which ones, in the end, were the best or the worst, and you could not go back afterwards and say, "That pair was okay and that pair wasn't okay," because you did not have the proper measurements in the first place.

The consequences of such an error: As we said before, Farm Q is a farm which breeds for other breeders. It wanted pigs it could sell to other people who wanted breeding pigs, and what it got was pigs which were not good enough for other breeders to be interested in breeding. They sold a number of the pigs for slaughter instead of for breeding, and slaughter pigs are not nearly as expensive as breeding pigs, as you might expect. The difference in price between the pigs they had to sell for slaughter and the pigs that they thought they would be able to sell as breeding pigs led to a loss of expected income.

The Ombudsman had no doubt, in his final report, that there was a loss. The fact that we are leaving the determination of the losses to a secondary question arises because there were a lot of discussions back and forth between the Ombudsman and the ministry on the question of liability. We never agreed on the question of liability. The matter of the amount of losses was therefore not discussed.

In the end, the Ombudsman agreed with the complainant and came to the conclusions and recommendations which you will see in our final report. If you turn to page 207, where the final report begins, the Ombudsman describes in the final report the question as it was brought to him by the complainant, the question of the losses suffered because the ministry's statistics were admittedly inaccurate; discusses the course of the investigation, which, as I have said before, was a long one, for a number of reasons; discusses the various positions put forward by the ministry, and in the end comes to a final conclusion and recommendation.

The final conclusion and recommendation are found at page 215. The final conclusion was, "The Ministry of Agriculture and Food unreasonably denied Farm Q's claim for compensation for financial losses suffered as a result of its reliance on unreliable data propagated by the ministry," and the final recommendation was, "The ministry of Agriculture and Food should compensate Farm Q for losses it suffered as a result of its purchase of breeding stock from farm 1 in 1983-84."

Mr. Bell has raised the question of Farm Q's ability to go to court. A couple of things need to be said. One is that Farm Q entered into long discussions with the ministry about this question very early on. As I have said, they discovered there were errors in the statistics. They then

discovered the ministry knew there were errors in the statistics and they began a long series of discussions.

At the end of those discussions, Farm Q came to us. It could have gone to court. That is not something which makes us turn a complainant away, as you have seen in other cases that we have brought to this committee. In fact, if we turned away complainants who came to our office instead of going to court, we would have almost no business at all because almost every complaint we get could be dealt with at some level by some court. Farm Q brought its complaint to us. It was a jurisdiction complaint and we investigated as we are required to do.

In the end, then, the Ombudsman found that farm Q had, in fact, suffered losses and that those losses could be connected directly to the ministry's actions.

In the course of our various discussions with the ministry and in the course of finding some agreed ground for this synopsis, we have had to consider many of the ministry's positions very carefully and very seriously. The ministry has some telling points which had to be addressed by the Ombudsman.

I would like at this time to address some of those points. You will see the points in the synopsis under the position of the Ministry of Agriculture and Food. I am not going to address them one at a time as they are written there because the way they are written, several of the points deal with the same subject matter. I am going to deal with them just as groups of problems.

Mr. Bell: Just for the record, you are at page 5 of the material, page 2 of the synopsis?

Ms. Morrison: That is right.

The first point the ministry makes is that although the statistics were wrong, Farm Q did not rely on them; it used other criteria in its choice of pigs. As I explained before, Farm Q certainly did use other criteria as well as the statistics. When one buys almost anything, one has a set of criteria that one has in mind for the purchase. If one is buying a car, you would usually look for things like efficient gasoline consumption and the time it will take for it to get to 100 kilometres an hour, if you are interested in speed. You would also like it to have sound tires and a good steering mechanism.

The fact that you want a lot of different things on your car does not make one of the things you want unimportant. In this case, of course, Farm Q wanted a number of things from these pigs. They had to be of high health status, they had to be sturdy and healthy, they had to be pedigreed pigs—they had to bring their papers with them—and they had to be lean and fast-growing.

The fact that they wanted a number of different characteristics did not make any of the characteristics unimportant. They chose the herd on the basis of all of those, but they chose the pigs from the herd on the basis of their statistics.

There is no doubt that OMAF was aware that there should be various factors when choosing pigs for breeding. In their Ontario Record of Performance, Swine Breeders Handbook, for example, they say the following, "Selection standards for performance should be as high as possible"—that is

the ROP statistics—"providing that the pigs are physically and structurally sound, with good confirmation and no physical defects."

At page 95 of your material, in Dr. F's report, he says, "Genetic merit alone is not a sufficient guide to source herds. Other vital considerations include breeder reputation for herd health, for service to customers," for an appropriate herd size, etc. The experts agree that one would not buy pigs only on ROP statistics. On the other hand, having chosen a herd with high health status with the right number of pigs, one would certainly want to use the ROP statistics to provide information about how lean and fast-growing these pigs would be.

Note again that it has to be kept in mind—it seems as if I am hammering away on quite simple points—we are not just interested in what these pigs are. We are not just interested in the measurement of the very pigs you bought. We are very interested that they breed for leanness and fast growth. The point of the program is not just to go around and find pigs which are in terrific shape today; we are really trying to find pigs that will have progeny which will also be lean and fast-growing. That is a very important point to remember.

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The second point OMAF makes, and it is not without difficulty, is that Farm Q used the record-of-performance data in a way it was warned not to. We agree that there were warnings to farmers and to Farm Q about the use of the ROP data, but as you will see in our report and in many of our materials, these warnings were not very clear. For example, at page 184, in a letter we provided to the ministry concerning the warnings—

Mr. Bell: Let us catch up to you, Ms. Morrison.

Ms. Morrison: We have some of the statements which were made in the ministry's publications. Gilts are female pigs; I did not know that either until I started this. It says in one of the publications: "In order to obtain gilts that are genetically lean and growthy"—that is, they will breed for leanness and fast growing—"performance information should be available for each gilt." Performance is ROP. "Ask the breeder for the home test index as well as the back-fat thickness and the age at 90 kilograms."

The ministry is suggesting that if you want to buy pigs, female pigs in this case, that are genetically lean and grow fast, you should make sure you ask for the home test index, which is exactly what Farm Q picked the pigs on.

The second one: "Lists of superior purebred and crossbred gilts and boars home performance tested under the ROP swine testing program are published every two weeks by the livestock branch, Ontario Ministry of Agriculture and Food." They are publishing these data for use by people in improving their herds.

The next quote: "As the home test index is the best single indicator of a boar's genetic potential, a producer should purchase a boar with as high a home test index as possible provided he is satisfactory in other ways." Exactly what Farm Q did. "Provided he is satisfactory in other ways," that is, you want it to be healthy and sound and have the highest index possible.

The next one: "Complete ROP information for all animals which have been ROP performance tested should be provided in sale catalogues and breeders

should include complete ROP information...." It does not sound, in those statements by the ministry in its publications to swine breeders, as if it intended them to pay no attention to ROP statistics. In fact, it intended that the industry rely on the ROP statistics in buying stock, exactly what Farm Q did.

Dr. F, who is one of the experts who provided a report on the ROP statistics which is included in your materials, recognized that people were relying on these statistics. The industry use of them was widespread. He says at page 166, at the very end of the first paragraph on page 166—

Mr. Bell: I am sorry. Could you just indicate to the committee what you are reading from?

Ms. Morrison: Yes. I am reading from a report by Dr. F. Just a second, until I get back to the index. Page 166 is where I am reading from. The report by Dr. F begins on page 93. It was a report that was submitted to the ministry and formed part of the ministry's response to our notice of intention to investigate. In that report, Dr. F states, "small differences in adjusted fact, and hence of index, are widely perceived as infallible guides to real differences in potential"—

Mr. Bell: Sorry, where are you again?

Ms. Morrison: Page 166.

Mr. Bell: All right.

Ms. Morrison: Bottom of the partial paragraph which forms the top half of the page.

Mr. Bell: I just want to make sure every committee member has it. Okay.

Ms. Morrison: He goes on to say, "This perception of infallibility is reinforced by the inclusion of test performance data on pedigree certificates issued by Canadian National Livestock Records, by minimum index values for boar purchases for AI stations...and by other 'official' policies or practices." It is clear that the industry was using the statistics and that the ministry knew the industry used the statistics.

He said, "Program managers in Ontario, as in other provinces, cannot be faulted for ignoring or minimizing the nonvalidity of between-herd comparisons based on home test results." That is at the very top of page 166.

Mr. Bell: Can you assist us with what the date of this report is?

Madam Chairman: Page 93. There is no date.

Ms. Morrison: This report was provided to us as part of the ministry's response to our section 19(1) letter. My understanding is that it was prepared for the ministry as a result of the problems that arose with the ROP program.

Mr. Bell: Is it your understanding it was prepared as a result of the specific complaints made by the complainant?

Ms. Morrison: No, that is not our understanding.

Mr. Bell: Was it commissioned before those complaints arose?

Ms. Morrison: I understood it to be prepared after the ministry was aware that there were problems with the ROP program; specifically, that it found the probes were inaccurate.

Mr. Bell: Okay. Perhaps we will find out when we speak to the ministry.

Ms. Morrison: Farm Q chose herd 1, and from herd 1 it chose its pigs. The effect of the particular choice of these particular pigs has been something which has been a matter of controversy between the ministry and the Ombudsman. The ministry is clear that herd 1 was a good herd. The complainant is clear that the herd was not as good as it thought it was. It was a good herd; there is no question about it. The herd was not as good as the statistics would have led the complainant to believe. In any case, he did not know which pigs of the ones he had chosen on the basis of their ROP statistics were the best pigs. The breeding program, which was carried out with the pigs purchased from herd 1, was compromised.

In the materials, you will find the ministry's submission that the effect of the errors was very small, that in fact it did not affect the quality of the pigs to any great extent. Their figure for the effect on the pigs is a very small one. They suggest that the difference between the pigs that Farm Q thought it was getting and the pigs that it got was only 0.3 millimetres of back fat in any case.

We could not agree with that figure. I have a diagram which I think I would like to show you just so I can tell you what we thought the real problem was. This looks a bit complicated, but it is not very complicated. This line up here is millimetres of back fat, and the higher up you go, the thicker the back fat is. This A is the average back-fat thickness for the herd, herd 1, from which the purchase was being made. Down here at B is the average value for the pigs in the sample which was bought. The pigs in the sample were 0.3 millimetres different from the pigs in the herd, on average.

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The problem is that these differences are calculated on the statistics as they were measured on the herd. That is to say, these were the record of performance published statistics, the ones which were wrong. What we do not have is any idea about what the real herd average was. The herd might have been this fat or that fat or that fat. We do not know. In that case, the difference between what was selected from the herd and the herd average could have been a much different number.

This point is one which matters in terms of the choice of the herd itself and how good the pigs overall were. What it does not address is the problem that we have already talked about, which is which of the pigs were the best pigs. Even if it were true that this A and A1 are the same number, that there is not any big difference here such as we have put a question mark for, we still have the problem that we could not tell which pigs of the pigs selected were the best pigs and which ones were the worst pigs, so that in a breeding program it was impossible to decide which pigs should be used for the very highest purposes, the purebred purposes, and which ones should be crossbred.

Mr. Bell: Ms. Morrison, before you leave that, will you do it once more, please, to make sure that everybody—

Ms. Morrison: Yes. The line up here is millimetres of back fat. The higher up you go, the fatter; the thicker the fat on the back of the pig.

At A—I think it is at B. You have this upside down.

Interjection.

Ms. Morrison: Okay. Skinnier?

A is the average published ROP values for herd 1. B is the average ROP values for the sample of pigs selected from herd 1.

Mr. Bell: When and by whom?

Ms. Morrison: By Farm Q.

Mr. Bell: After they bought them?

Ms. Morrison: No, this was when they selected. If you take the figures of the herd average and the figures of the pigs that they selected, this is the difference you will get, 0.3 millimetres.

In other words, they were trying to get the very best pigs out of the herd. The bigger this difference, the better off they would have been, because they would have been getting leaner and leaner and the leaner the pigs the bigger this difference is, right? If it had been down here somewhere, the pigs that they got would have been 10 millimetres skinnier than the herd average. Okay?

As it happened, the pigs that they got were only 0.3 millimetres skinnier than the herd average, even though they took the very top ones.

The problem with the figures is that the only figures we have for these are the figures which were measured, which were wrong.

Mr. Bell: Who measured B?

Ms. Morrison: B was measured—

Interjection: Who knows about the figures?

Ms. Morrison: These are the published ROP figures for the herd.

Madam Chairman: Yes, A, but what is B?

Mr. Bell: A is the herd average?

Ms. Morrison: That is right.

Mr. Bell: B is the selected pig average within the herd.

Ms. Morrison: That is right. Remember I said they wanted 96, 95, 94. They looked at 96, 95, 94 and decided whether they were good pigs. If you take all the pigs that they selected and found their average, published ROP, it would be 0.3 millimetres better than the herd average.

Mr. Bell: All right. I am sorry; I think this is important for the committee members. According to your investigation, the complainant used in the purchasing portion—

Ms. Morrison: Right. He used published figures.

Mr. Bell: —used the figures twice: One the general herd average figure—

Ms. Morrison: That is right.

Mr. Bell: —and then a selection of pigs within the herd that had higher values.

Ms. Morrison: That is right.

Madam Chairman: Also, Ms. Morrison, we have two questions and I will ensure that they must be kept with this diagram, because this is causing some confusion, I think.

Ms. Morrison: Okay. Do you want me to run through it once more before we ask the questions? No.

Madam Chairman: No.

Mr. Lupusella: No, I think it is very clear. My question is based on the fact that you should tell us when the new technician hired by Farm Q gets into the picture. Is it at this stage or before that?

Ms. Morrison: These statistics are only based on the statistics which were published by the old technician. These figures are the figures which were published for the herd. The published figures for the herd gave this average and Farm Q went in and said, "We want to get the very best ones out of that herd." This is the idea. The reason you select them is that you say, "This is a pretty good class, they've got a 75 per cent average, but I only want to hire the person who's got 90 per cent, the person who's got 80 per cent," etc.

That is what Farm Q was doing with pigs, essentially going in and saying: "This is a very good herd of pigs. They're all pretty good, but I don't want just any of them. I want the best ones." So they selected what they thought were the best ones. What they thought were the best ones turned out to be a little thinner than the average, but only 0.3 millimetres thinner than the average. The problem with the 0.3 figure is, first, that it is not very much. They did not get a very big improvement on the average by selecting the pigs, but worse than that, these figures are the published figures and we do not really know what the herd average was.

Mr. Lupusella: You are not answering my question, whether the selection was based strictly on figures published by ROP, or Farm Q had hired a new technician and found out that the figures were wrong.

Ms. Morrison: No. Farm Q purchased the pigs, selected the pigs, on the published statistics, because it had no notion that the statistics were wrong.

Mr. Lupusella: So when did the new technician come into the picture?

Ms. Morrison: Once they have the pigs bred and back to Farm Q.

Madam Chairman: Could you put a date on this for us? Just arbitrary? Is it 1984 or October 1983? A selection date, so that we have a progress of when this occurred and then perhaps when subsequent—

Dr. Lee: It was early 1984, the selection.

Madam Chairman: So January 1984 as an arbitrary date? But the average was October 1983.

Dr. Lee: The average goes back several years.

Ms. Morrison: The average is the running published statistics of the ministry. The ministry is looking at these herds all the time. They send their technicians out and measure them. What they have is measurements for the pigs in this herd, giving an average of X for the herd. Now, the average will go up and down a little, because maybe one of your pigs is not as good next month as it was last month. What you are looking to here is the average over the herd of the ROP statistics published by the ministry.

So we had two problems. One was that the herd was not as good as it looked overall and the second was that the pigs that were chosen could not be distinguished as to what their real leanness and growth rate was, because the statistics were wrong.

I should note, when we were talking about warnings, that there were a number of warnings by the ministry about reliance on the statistics. Those warnings never said that the statistics might be wrong. That was not the sense of the warnings. Wherever there were warnings, they were warnings that said, "Maybe you shouldn't use this statistic for this purpose," but it never said, "Watch out, these statistics might be wrong."

In this case, we see that the effect of the wrong statistics was twofold. It was, first, to give an average of pigs chosen with a less good characteristic for leanness and growth than they might have had had the statistics been correct; and, second, to mix up the chosen pigs so that you could not tell which one was better than which other one.

The next point the ministry makes with respect to Farm Q's losses and its reliance on the ROP statistics as the cause of those is that the subsequent performance of unit 6 pigs was so good that they must have been very good pigs anyway.

The Ombudsman in his investigation made a finding that the pigs were culled in the first year, because they were sold for slaughter and not for breeding, and that at least in the first year of operation of unit 6, Farm Q suffered losses because the pigs were not as good as it thought they were going to be.

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The ministry suggests that the herd was excellent and that the fact that Farm Q used many more herd 1 pigs than herd 2 pigs, another herd they had, indicates that Farm Q was satisfied with the pigs.

Farm Q was not satisfied with the pigs. In the end they could not sell the pigs as breeding pigs because people coming in to buy the pigs were

requesting a certain index and these pigs could not meet the requested index. It is important to note that buyers were not asking for pigs by herd. They were not saying: "I want one of your unit 6 pigs." What they were saying was, "I want a pig with an index of X," and unit 6 could not supply pigs of that index.

The next point that might be made when you hear that is: "Maybe these were just bad farmers. Maybe there are other reasons why their pigs were fat and therefore could not be sold for breeding." Farm Q had another herd, another unit, which had no such problem. From our investigation, the Ombudsman was satisfied that the cause of fatness in the pigs in unit 6 was that their genetic stock was not what Farm Q had thought it would be.

The Ministry of Agriculture and Food agrees that the pigs in unit 6 were excessively fat. If you look at page 194, point 7 in the ministry's letter to the Ombudsman says, "The excessive fatness of pigs in unit 6 experienced by herd 1 is not primarily a genetic problem." They do, however, say that the pigs are excessively fat.

The Ombudsman found that the pigs were fat and that they were genetically not what Farm Q had asked for. The ministry has agreed that the pigs were excessively fat. The farming operation of Farm Q was such that the Ombudsman was satisfied that the fatness did not arise from other characteristics.

One of the other characteristics suggested by the ministry, for example, is that this is a new high-health status herd. High-health status herds are a particular kind of herd in which the health status is specified and known. It is a term of art in the raising of pigs.

The ministry, in one of our discussions, suggested to us that the reason the pigs in unit 6 were excessively fat was that it was a new high-health status herd and that high-health status herds always were fat at the beginning, and eventually they became not so fat as the breeding program went on. We thought that sounded pretty reasonable, so we asked the ministry for information that would confirm that. In fact, the ministry suggested it could send us a scientific paper which would confirm that new high-health status herds are always fat.

When we received the paper, it did not support the proposition that high-health status herds are always fat. So we asked the ministry again, and the ministry said, "You are right; the paper does not support that proposition, but it is common knowledge that high-health status herds are always fat." We could not very well just take their word for that at this point, so we said, "Let's find out if it is common knowledge." We went to various pig breeders in the province to find out what they thought about high-health status herds and whether they were always fat to begin with.

One of the breeders, a very reputable, very large pig breeder, told us the following. He said a new herd may be developed in a number of ways, but there are two main ones. In one, the piglets are taken by caesarean section from the mother and they are reared in a special isolation unit. One of the isolation units he was talking about was at the University of Guelph. In these isolation units, the piglets grow in a sterile environment. They are kept very clean. In fact, they use gloves that you put your hands through to touch them and so on. They are very clean. They are fed on Carnation milk. Such pigs tend to be fatter than their parents; that is, at the beginning of such a herd, you will see fatness because of the way they are being handled.

The other way to develop a high-health status herd is to take the pigs directly from an excellent health herd to start another excellent health herd, which is what Farm Q did. Here, they will be raised under normal conditions, very clean and taken care of, but not sterile. Such pigs, in normal conditions, do not show a tendency to be fat in appearance.

We also noted that no such fatness had been noted in another unit at Farm Q. The evidence we gathered was that the fatness in the pigs in unit 6 was a product of their genetic makeup, which was not as good as Farm Q had hoped, and that high-health status herds do not necessarily grow fat in the first growth. Certainly we could not establish, from talking to pig breeders or experts, that high-health status pigs will always be fat.

The last point that the ministry makes—I hope it is the last—is the question that Farm Q caused its own problems. Farm Q, as we have said earlier, found out that the statistics were wrong. It was clearly upset by the fact that the statistics were wrong, because it was depending upon those statistics as a way of telling that it got good pigs and, further, depending upon the statistics in breeding the pigs one to the other.

The ministry says that at the time Farm Q found out about the wrong ROP statistics, it publicized the fact that these statistics were wrong and that they were causing it a problem. The ministry says because Farm Q promoted the publicity or in some way caused publicity about the wrong ROP statistics, it was the author of its own misfortune. They could not sell the pigs because they had told people they did not have good pigs.

Our investigation showed that inquiries were made from Farm Q about buying the pigs from unit 6, but the inquiries were made, as I said earlier, on the basis of index. People came along and said, "Could you, Farm Q, find me a pig of such and such an index." Unit 6 could not produce pigs of that index. It did not have good enough pigs to meet the requirement. That was why Farm Q sold the pigs for slaughter. No farmer in his right mind would sell a pig for slaughter that he could sell for breeding. It would be silly. It is like selling your car for scrap if you could get a good trade-in value on it. Farm Q sold pigs for slaughter because it could not sell them for breeding, and suffered a loss.

The other point which struck us when talking about the publicity about the ROP statistics is that one would not have wanted to encourage Farm Q to hide its problems. The idea that the fact that there was publicity about the ROP statistics and the problem they had caused Farm Q somehow resulted in Farm Q being the author of its own misfortune is to suggest that somehow Farm Q should have hidden these problems from the press and from prospective buyers. It appeared to us that would not be a sound suggestion.

In summary, going through the position of the ministry, we found we were not convinced by the fact that Farm Q had relied on other things besides the record of performance statistics, that it was in fact quite prudent for it to have investigated other factors and to have relied upon high health status, the physical characteristics of the pigs, etc.

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We found that the ROP statistics were wrong, as the ministry agreed they were, that although the ministry had warned about use of ROP statistics, it had never warned that the statistics might be wrong, and that in any case its warnings were not clear warnings. You cannot give a warning on the one hand

saying, "Be careful how you use these statistics," and on the other hand, suggest to swine breeders that they ask for the home ROP statistics before buying either boars or gilts and that they base their decisions in buying pigs for breeding on the ROP statistics.

We found that the warnings were not clear and therefore that the ministry could not use the fact there were warnings to deny that its wrong ROP statistics led to losses on the part of Farm Q. We found, as we said, that the fact the pigs bought by Farm Q were 0.3 millimetres leaner than the herd average as published in the ROP statistics did not mean Farm Q got what it bargained for.

Farm Q, looking at the ROP statistics, said, "These statistics are so good you could not possibly have these statistics unless these are fabulous pigs, superior pigs," and it wanted to know which pigs were the best of the superior pigs. They could do neither of those things because of the mistakes in the ROP statistics.

In the end, we were not persuaded that the publicity surrounding the wrong ROP statistics affected Farm Q's losses in such a way as to make it the author of its own misfortune. In fact, they would have been quite wrong to hide the fact that they were having difficulties with the ROP statistics as a result of the ministry's publication of wrong figures.

The Ombudsman recommended that the ministry compensate Farm Q for losses it had suffered. As I said, we did not detail the losses, because our discussions with the ministry never got past the point of liability. At one point, Farm Q provided a figure for what it felt the losses to be, but the Ombudsman did not go behind that figure and audit or look into the figures from Farm Q any further, because at that point it would have been a waste of time if we were not talking about a situation in which liability had been established.

In short, we felt that Farm Q's complaint, which was that the ministry refused to compensate it for losses it suffered by relying on wrong statistics published by the ministry and intended by the ministry as a guide to the purchase of breeding stock—we felt that Farm Q suffered losses and that those losses ought to have been compensated by the government. The ministry has refused to compensate in many discussions prior to our investigation, and our investigation led the Ombudsman to believe that the ministry's refusal was unreasonable. He therefore recommended that compensation be paid.

Madam Chairman: Thank you. Just in terms of procedure for the committee for those members who have not participated before, I would appreciate it if you could confine your questions to the Ombudsman's office at this point. Certainly, if the ministry would like to clarify something, it is always open to jump in, but perhaps you could, for order, keep it to the Ombudsman's office, and then we will move to the ministry after.

Mrs. LeBourdais: I guess the first question I would like to have answered is the difficulty of doing this kind of testing. I am just trying to find out some reason there might have been the discrepancy. Would it be the lack of expertise of the tester, or is it a fairly simple test, or is there any reason there would have been the variance?

Ms. Morrison: I can address that question in a couple of ways. One is that it is a program of testing, and it has to be continuous testing for the statistics to be really meaningful, in any case, but if you look in the

ministry's documents, it has provided you with some information on the difficulties.

In Volume I of the ministry's documents—let's see how we do this. If you look from the back of the document, there is a tab 59. If you open it at that—

Mrs. LeBourdais: Mine stops at 21. My tabs stop at 21.

Ms. Morrison: I see. There is a number on the purple sticker, too, that says 6. If you look at that memorandum, which is a ministry internal memorandum about quality control in the ROP program, you will see that there were a number of problems with the program, problems including difficulties with the equipment, which had originally been purchased as industrial quality equipment. It was originally equipment, as you will see in the third page of that memorandum, that was used for the structural steel industry to detect flaws in structural steel. It was never intended, really, for this particular purpose and led to some difficulties.

In this memorandum, which we take from the date on it to have been somewhat after these difficulties were discovered with the technician's measurements, the ministry discussed a number of different problems with the ROP measurement programs, including equipment, training of technicians, etc.

Mrs. LeBourdais: Would one assume that the two testers both used this poor equipment, or could the second tester have used better equipment?

Ms. Morrison: My understanding is that the second tester used a different piece of equipment and that the difference in the values might have been both a problem with the way the technician was doing it and a problem with the equipment. That is my understanding.

Mrs. LeBourdais: How much can someone who is a professional at raising pigs determine by a good eye? Obviously, a physical disability might be apparent confirmation. Could a real professional determine thickness of fat just by his experience dealing with those kinds of animals?

Ms. Morrison: The fact that the ministry set up the program to measure the fat and measure the growth rate of pigs really speaks to that. You are not just interested in how fat they are; that might be fairly straightforward. What you are interested in is how fat they are and how fast-growing they are simultaneously. It is very easy to get a lean pig, but he will never grow very fast, so looking at him will not help you. You will not be able to tell by looking at him whether he's growing fast or not. You have to keep track of how fast he grows and what thickness of fat there is and combine those two into an index in order to be able to tell anything at all about the fatness.

Mrs. LeBourdais: Therefore, even a well-trained eye could not really determine that kind of thing.

Ms. Morrison: That is my understanding.

Mrs. LeBourdais: What are the ROP statistics on the progeny as compared to the parents? As I understand it, obviously they would have been substantially lower, and therefore not saleable as breeding stock.

Ms. Morrison: I do not think we have an average for the progeny.

Mrs. LeBourdais: But presumably the ROP statistics were significantly lower, did not meet the sale requirement or what the customer was requiring.

Ms. Morrison: That is right.

Mrs. LeBourdais: Did farms other than Farm Q purchase stock from herd 1 and did they have the same poor results in that they also had financial losses or could not make the sale?

Ms. Morrison: Farm Q was the sole purchaser at this particular time from this particular herd.

Mrs. LeBourdais: Good old Etobicoke West is not exactly the heart of farming country, but from what I know, for instance about the breeding of Holstein cattle, the statistics and information kept on each animal are significant right down to computer printouts and drawings of the spots on the cow. It seems very iffy with pigs. Why is there such a discrepancy when we are in a sense still dealing with breeding, and the statistics on the background of the animal are very important? In one area it is extremely precise. Is this just not common with pigs?

Ms. Morrison: My understanding of the ROP program was that it was set up to meet that very need, the need for more specific information on the genetic capacity of pigs to be lean and fast-growing.

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Mrs. LeBourdais: Did each animal not have a number, an ROP index, a confirmation drawing and other details?

Ms. Morrison: Each animal had an index.

Mrs. LeBourdais: Like a profile on each animal; I guess that is what I am saying.

Ms. Morrison: There were pedigree papers and there were indices. Each pig had an index. In fact, that is what caused some of the problem here, that of the pigs that were chosen by Farm Q, each one had an index. Farm Q tried to choose the best ones. Because the indices were wrong, they ended up not choosing the best ones. Worse than that, they ended up mating the wrong ones with the wrong other ones.

Mrs. LeBourdais: I see. Regarding subsequent litters and this discussion about the degree of fat sometimes changing, did we ever get to a second and third litter? Did their indices improve as subsequent litters came along?

Ms. Morrison: Yes. The indices of this particular unit are very good now for a couple of reasons. One is that during the first year there was a culling program; that is, the pigs that were not good enough for breeding were sold for slaughter. Farm Q's breeding techniques are obviously good because unit 6 pigs are now superior pigs.

Mrs. LeBourdais: Does Farm Q still have some of this original

purchase and are they still breeding? Are the litters that are now coming along up to the indices that are necessary?

Ms. Morrison: My understanding is that they would not be breeding from the very pigs they bought. They would be breeding from progeny of those pigs. A culling program is one where you take the progeny and you take the good ones and breed them and take the bad ones and throw them out. So my understanding is that they are now still breeding from that line of good pigs.

Mrs. LeBourdais: I guess that covers my questions. I just want to make one comment, that certainly the desire or the fact that Farmer Q went public, so to speak, would attest to me a little bit more to the man's honesty in not wanting to continue to sell product that was not up to standard, partially, I suppose, combined with the frustration, obviously. I would think that would be a positive thing.

Mr. Carrothers: I just want to get a sense to make sure I understand this because the only time I have dealt with confirmation of animals is at dog shows and this is sort of a new context. I understand the point was that the pigs they bought were fatter than they anticipated. They will produce progeny, as you call it, that were fatter than anticipated and then they could not sell them. Do you measure each pig, the new progeny? Would they have been tested?

Ms. Morrison: Yes. The home test program is carried on at all of the farms. Farm Q has its own home test program and has the ROP figures for all of its pigs.

When someone comes to buy a pig, he says: "I'd like a pig of this good index. I also want it to have straight legs and a curly tail and bright ears," or whatever, but they specify the index. The way Farm Q knows which pig it could sell them, if it has one good enough, is by its own measurements of its own home test.

Mr. Carrothers: The index is created just for that pig? It does not depend on its blood lines?

Ms. Morrison: Because these are pedigree pigs, most of the people buying them will want to know not only that pig's index but its parents' index, etc.

Mr. Carrothers: I guess I am trying to get a sense of this. If the data for the whole herd was mixed up, was it a combination of getting an unexpectedly fat first generation, plus the fact that the data relating to their parents, I guess, was not able to be used?

Ms. Morrison: That is right.

Mr. Carrothers: How has it been straightened out so that they now have pigs they can sell? Is it just because they have generated data within their own—

Ms. Morrison: That is right. You can then remeasure all of these pigs. The problem at the outset was that you bought pigs you thought were—to give some example numbers, suppose you thought you got a 150, 140 and 130 and it turned out that when you got proper measurements for them, they were 85, 105 and 93. They were not only lower than they were supposed to be, but they were mixed up so the top one was not the top one any more, etc.

Mr. Carrothers: Is it so precise that you can take the indexes of the parents and predict the index of the progeny?

Ms. Morrison: That is your hope. That is why you are buying pigs for breeding from people who have this.

Mr. Carrothers: That is your hope, but does it happen? You mentioned there was culling. I guess my next question is, how common is it to have to cull that first generation? It would seem there is a bit of hit and miss here. As you are saying, you are hoping for the results, but it is not so scientific that you can get it, and this type of problem would possibly exist in any herd being bred.

Ms. Morrison: As the ministry's publications I read suggests, breeders should be picking pigs for breeding on the basis of their record of performance statistics; that is, they should try to pick very good ones. The reason they should do that is not that the pig is lean and fast-growing, but that the pig's children will be lean and fast-growing pigs. So the purpose in Farm Q's specifying ROP was to get pigs whose progeny would be lean and fast-growing. The ROP program is based on that assumption.

In the end, what happened at Farm Q was it produced pigs that were not lean and fast-growing. They produced some lean and fast-growing ones and some fat and slow-growing ones.

Mr. Carrothers: Maybe the question will be answered as we carry forward. What I am still not quite sure about is that you try to do that, you get the indexes, you line them all up, you breed them according to a plan and you hope to get a particular result.

I guess the question I have is, in general, how close do you get to the results you are trying to get? If you are building an index based just on that one pig or maybe a couple of generations of that pig, it strikes me it may not be a complete database, and therefore the herd you produce may not be quite what you expect. I guess I am just wondering what the error factor is, if there is one.

Mr. Dombek: Perhaps Dr. Kennedy might be able to answer that question for you. He has been following these pigs and others throughout the province.

Mr. Carrothers: Perhaps this is something we will get to at a later point as we go through.

Ms. Morrison: My understanding is that normally they breed true. That is why you have these statistics. Lean, fast-growing pigs breed lean, fast-growing pigs. In this case, the fact they had fat, slow-growing pigs was because the indices were wrong.

Mr. Carrothers: But what I have seen in breeding dogs, and it may not be the right example, is it does not always come out the way you hope.

Ms. Morrison: That is why they check things like conformity.

Mr. Carrothers: Yes.

Ms. Morrison: They will breed for fatness.

Mr. Carrothers: You go through a similar exercise breeding dogs. It may not be quite as statistical, with all these fat tests, but I am just saying there is still a chance you may not get quite what you expect. That is the point. This is perhaps something we can pick up later.

Mr. Bossy: I have some difficulty with quite a bit of the material that has been provided.

Madam Chairman: Could you move a little closer to the microphone?

Mr. Bossy: Having been involved in the feed business for 18 years with Canada Packers, some of the statements that are being made are sort of hard to accept, because when we are talking about breeding these so-called special pigs—first of all, I might as well start at the beginning.

I would like to know if Farm Q, in your investigation, knew farm 1; in other words, farm 1 that it bought from? How long had they both been in business?

Dr. Lee: As far as I know, farm 1 has been in existence at least 20 years, and also Farm Q.

Mr. Bossy: So they were very aware, because those people talk to each other an awful lot and are very aware of each other's operations. I imagine you must have assumed that when you went to see these operations. At the same time, were the pigs that were bought by Farm Q the first ever that Farm Q bought from farm 1?

Dr. Lee: I do not know.

Mr. Bossy: I am trying to establish here what experience Farm Q has had over these years. We have to assume that there are a number of—

Dr. Lee: Apparently, it was the first batch Farm Q ever bought from farm 1.

Mr. Bossy: You are saying it probably was, but you are not sure.

Dr. Lee: I am so informed by one of our people.

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Mr. Bossy: When we look at numbers, the number must have been for the only pigs that were available in that group. We say 179 were picked the first time. Then they were bred and sold; in other words, were transferred to the Farm Q operation. Did you investigate the feeding habits of Farm Q and the feeding habits of farm 1, what feeds they were using in the transition and what took place as far as interruptions in their feeding?

Dr. Lee: Farm Q and farm 1 got their feed from the same supplier.

Mr. Bossy: I presume that both of these farms have their own technicians for testing. I believe I heard that.

Dr. Lee: No, it is a ministry technician.

Mr. Bossy: But their own operation. When they are just adding on a

\$1.8-million operation to what is already existing, I have to assume here that the sixth operation is really—they have got another five.

Dr. Lee: They have three other herds which are for breeding purposes.

Mr. Bossy: In other words, the tests of the different barns—we will call them barns because these are hog barns that are really in operation—did they make available to you the statistics on each one of those barns?

Dr. Lee: The ROP statistics?

Mr. Bossy: Yes.

Dr. Lee: No.

Mr. Bossy: They did not make that available to you to compare for comparison purposes?

Dr. Lee: No. We were interested in the performance of unit 6 in relation to the pigs which they got from farm 1. We do not need to compare what happens in the other herds.

Mr. Bossy: The reason I am saying to compare is because they were looking for an improvement. They wanted to improve themselves. That was the goal that was set up here: to have a leaner pig in the end, or a sow that would produce more consistently when bred. In other words, assumptions are made here that they would produce 18 piglets a year. In the overall analysis of dollars and cents, there are a lot of assumptions made. I did not see—and forgive me if I did not go through all of it—the market values either, during that period of sale. There could have been an awful discrepancy, because at that time the market went through a tremendous change. I know that several hog operators went bankrupt back home. What effects did all this have on this loss? It is a momentary loss they are looking at.

Dr. Lee: We looked at the financial statistics and compared the four herds. We found that the first three herds operated by Farm Q were making money. In 1984 and into 1985, unit 6, also run by Farm Q, lost money.

Mr. Dombek: Perhaps we could break in here. I think this is a matter of contention between the parties, and I thought Mr. Bell tried to get into this right at the beginning.

Madam Chairman: Thank you. I was going to caution Mr. Bossy that before he came into the meeting today we had decided we would not look at the monetary aspect. We would first determine the liability and then look into the monetary loss or whatever has been involved. There has been somewhat of an agreement that we just discuss the liability or perhaps the actual herd and not look at the money at this point. I think there has been agreement and it would be easier at this point just to determine.

Mr. Bossy: You mean we are mainly concerned at who bred what within barn 6; that we should get to the depths as far as the boar hogs, where they came from and were they the same as were being used in other barns on Yorkshire pigs?

Dr. Lee: No. The pigs which were bought from farm 1 were kept in unit 6. You cannot mix the different herds. The breeding which was done in unit 6 was between the pigs bought from farm 1 and from farm 2. On the whole,

they tended to breed the farm 1 pigs together and the farm 2 pigs together, but they all remained in unit 6.

Mr. Bossy: We are talking about total breeding stock. You have sows and you have boar hogs. If you have taken them all out of the same barn or out of the same litters, you are going to have inbred. In other words, what section of barn 6 or from their own internal herd were boar hogs brought in to breed the sows that were brought in from herd 1?

Dr. Lee: The animals in unit 6 consisted only of animals bought from herd 1 and from herd 2, no other animals. So boars and gilts came from herd 1, and boars and gilts from herd 2. No other animals were in unit 6. It was a completely new unit.

Mr. Bossy: There are several other questions I have, but I am just going to step aside.

Madam Chairman: You can have plenty of opportunity. I have two more on the list before lunch break. Mr. McCague.

Mr. McCague: On the chart you have here and in the material, in the synopsis, you mention the 0.3 millimetres. Is that an exact figure or is that an estimate?

Mr. Dombek: Once again, perhaps Dr. Kennedy will be the best person to answer that for you. The 0.3 millimetres is a worst-case scenario. When Dr. Kennedy from the University of Guelph explains it to you, I think you will find that there is really a relationship between the two tests that were taken. The 0.3 would have been a situation where there was a zero relationship, where the first technician's measurements were so far off that there was no relationship at all to the second measurements that were taken. When Dr. Kennedy did his study, he finds that there was a relationship, so he actually disputes the figure of 0.3. He used it originally as a worst-case-scenario situation. Again, that can probably be explained a little later on.

Mr. McCague: From the Ombudsman's side, then, the 0.3 is your estimate or whatever it is of the difference between the first inspector and the second?

Ms. Morrison: The 0.3 arises from a ministry expert's report, in which he took the average published ROP values for that herd and took the average of the animals selected and found that the difference between those two was 0.3 millimetres.

Mr. McCague: So you are relying entirely on that figure that appeared at some point in time.

Ms. Morrison: The Ombudsman's point, I think, is twofold: one, that Farm Q was trying very hard to get animals which were low in back fat. They would have liked animals that went off the bottom of the chart, but they did not get that. They got ones which were only a little better than the average ROP values published for the herd. That is what they thought they were getting, but in fact because they did not know what the real figures were—those are the published figures; those are the wrong ones—they could not even tell how different the selection was from the average.

Worse than that, they could not tell what animals of the ones they chose

should be bred with what other animals, because they chose the animals they thought were ranked in a certain way: the best one, one further down and so on. When they went to breed the animals, they would want to breed them in a certain order. Because the statistics were wrong, that was not possible either.

Mr. McCague: So you did not do any investigation at all to see whether 0.3 is a worst-case scenario?

Dr. Lee: The ministry's expert calculated this figure at 0.3. This is what Farm Q thought it was getting. They actually got an average somewhere up here. We do not know—no one does—how much this gap is. What we know is that the difference that Farm Q experienced was the difference between A prime and B, which consists of this error plus this little error which was computed at 0.3. So we know it is incorrect to say the maximum effect was 0.3, because it ignores this error.

Mr. Dombek: I have to jump in here. I hate to but I have to, because I think that is a matter that Dr. Kennedy, who is a world-renowned expert in this area, can explain very easily.

Madam Chairman: Maybe we will let that line of questioning be pursued later today, and tomorrow morning, with the ministry responding.

Mr. Farnan: I think it is very important to firm up the fact that Farm Q did not get what it bargained for. I would just like you to give me some information here. Would the ROPs on other farms be more accurate than the ROPs on farm 1?

Ms. Morrison: At the time this problem arose, there were problems with the measurement by this particular technician in more places than just farm 1.

Mr. Farnan: Was this confined to several farms or a particular region of the province?

Ms. Morrison: I understand that 25 herds, in fact, had wrong ROP measurements taken by this technician.

Mr. Farnan: If Farm Q had purchased from a different area of the province, in which this technician was not operating, would it have received a more accurate ROP?

Ms. Morrison: If there were no errors in the ROP measurements, they would have, but they were looking for a herd with the best possible statistics. So if they looked everywhere in the province, this herd had amazing statistics. That leads them to a particular choice, if they do not know anything about possibilities of error. The ministry has never said, "Watch out. These statistics might be wrong," so they look at the statistics and say, "Here are statistics which are so good that the only way they could arise is if these pigs are genetically fabulous."

Mr. Farnan: I accept that. I can understand why Farm Q was attracted to farm 1. What I am suggesting to you, and I think it is relevant to the case, is that if the technician were competent and were producing the ROPs as they should be produced and were perhaps being produced in other areas of the province, this problem would not have arisen.

Ms. Morrison: That is right.

Madam Chairman: If we could, I would like to hold the questions now until we return at two o'clock. We should try to start promptly. We will adjourn for lunch.

The committee recessed at 12:04 p.m.

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STANDING COMMITTEE ON THE OMBUDSMAN

CASE OF FARM Q

TUESDAY, MARCH 28, 1989

Afternoon Sitting



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Bossy, Maurice L. (Chatham-Kent L)
Carrothers, Douglas A. (Oakville South L)
Charlton, Brian A. (Hamilton Mountain NDP)
Cousens, W. Donald (Markham PC)
Henderson, D. James (Etobicoke-Humber L)
LeBourdais, Linda (Etobicoke West L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitutions:

Cureatz, Sam L. (Durham East PC) for Mr. Pollock
Farnan, Michael (Cambridge NDP) for Mr. Philip
McCague, George R. (Simcoe West PC) for Mr. Cousens

Clerk: Carrozza, Franco

Staff:

Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon
Wilson, Jennifer, Research Officer, Legislative Research Service

Witnesses:

From the Office of the Ombudsman:

Morrison, Gail, Director, Investigations
Lee, Dr. Allan, Investigator

From the Ministry of Agriculture and Food:

Dombek, Carl F., Director, Legal Services
Pettit, Dr. James, Director, Animal Industry Branch

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Tuesday, March 28, 1989

The committee resumed at 2:05 p.m. in committee room 2.

CASE OF FARM Q
(continued)

Madam Chairman: We are resuming the case of Farm Q and the Ministry of Agriculture and Food. We had recessed, and at that time I had no more committee members on my list. We still have a few questions I would like to ask Mr. Bell and I would certainly entertain more questions from the committee. Then I would suggest we move ahead with the ministry's side of the story, if that is an appropriate way to proceed.

Does anybody have any comments before we begin? Seeing none, Ms. Morrison, you made a comment in your presentation that Farm Q had learned from the record-of-production data that herd 1 was of superior quality. You had made reference that they looked at it again. I wish I had stopped you at the time, but I did not know what you meant by that. Did they take a second look at the data? Did they take a second look at the herd? Did they sort of canvass all herds and then took a second look at this herd because the data were good? I was not quite sure.

Ms. Morrison: Essentially, I meant the data were so good that they caused them to really look seriously at the herd as a source of supply. They had other criteria on which they were basing their choice, but when they saw the statistics, they were so good that it caused them to look very seriously at this herd as their source of supply.

Madam Chairman: So it was that. I was not sure whether to infer that or the alternative, which was that they were so good they did not believe it and wanted to have another look at it from that perspective. It was more that they had another look because they were interested in purchasing.

Ms. Morrison: Yes. They felt the statistics could not have been that good if the pigs were not very genetically superior.

Madam Chairman: What I have not quite got is that when they ordered the pigs—I do not know whether that is the proper term—when they decided to purchase a certain allotment of pigs and then they were delivered—I gather they were delivered—how long after the delivery were they then again tested for back fat?

Ms. Morrison: A few weeks.

Madam Chairman: That few weeks later, was it by the same inspector or person, or was it by a completely different process and that is when the discrepancies occurred?

Ms. Morrison: My understanding is that Farm Q objected to the regular prober, Mr. C I think his name was, because Mr. C was involved in pig farming. When you are trying to maintain a high-health-status herd, you want to be careful that someone from another herd does not introduce disease from

there. They objected to that particular prober and had another prober measure the pigs. It was at that time the probes turned out to be much different from what they expected they would have been had the first probes actually been accurate.

Madam Chairman: I see. Then after they knew that, after three weeks or five weeks, that is when they immediately contacted the ministry with their concerns, or was there a further delay in that?

Ms. Morrison: I understand they immediately contacted the ministry. I understand this from the ministry's own documents in its volume I, which Mr. Bell was asking me about at the break.

This contains a letter at tab 20 in which the complainant writes to the minister setting out the details of what happened following the purchase of the animals. From this letter, you can see at paragraph 5 on the first page of the letter, "Because of the expense we have incurred in cleaning out and sterilizing our facilities and the health of the...animals (for which we paid a premium) we declined to use Mr. C, the prober for the area" because "Mr. C runs pigs and therefore could carry disease." There is an aside comment, "We think ROP officials should be debarred from running pigs."

The ROP supervisor co-operated and sent another prober and, "The probes were astronomically high, not in keeping with herd 1, and the animals were useless for breeding purposes."

I must admit I was not aware of exactly this turn of events, but on page 2 they say: "Mr. C was on leave when our animals were probed at farm 1, so another prober was sent. His results were so inferior to McKee's that farm 1 requested another official be sent." This was something Farm Q did not know about. This had happened earlier. Those probes were also inferior.

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"When farm 1 complained Mr. C was recalled and the ROP"—that is the program—"decided that his probes would stand as the official results and animals were delivered to Farm Q on that basis." I understand from that, although I was not clear about it this morning, that prior to delivery of these animals to Farm Q, the ROP people knew that the probes were wrong, that the statistics were wrong.

Mr. Dombek: That is quite a leap in logic from what is said there. That is the complainant's position.

Ms. Morrison: We had not had that confirmed by the ministry, but I do see it in the ministry's documents as one of the pieces of information about the timing of the finding out of the wrong statistics, which is a little unclear because the timing of when Mr. C went on vacation is a bit critical to this.

Madam Chairman: Given what you told us on page 166 of the documents, as I say, where the ministry in its memo said how much perhaps the ROP factors were depended on, given your agreed statement of facts which is under tab 3, it is mostly to do with the warnings I am zeroing in on here. Number 8 in the synopsis infers that the warning was only brought to the attention of the purchaser, Farm Q, because the complainant's brother-in-law's brother was curious.

Ms. Morrison: He had written to the ministry with a query about the statistics. At that time, a response to him did confirm the warnings about the way of using the statistics in choosing among herds.

Madam Chairman: To the best of your knowledge, is there anywhere else that warning has appeared about the ROP statistics?

Ms. Morrison: The regular ministry documents that it puts out on a monthly basis have warnings in them, but those were the documents that also contained those other paragraphs I read to you this morning. So on the one hand the ministry's documents were saying, "Warning: Do not use these statistics in a certain way," and on the other hand they were saying, "Before you buy your pigs, do not forget to check the ROP statistics." So it appeared to us that the industry used the statistics in the way in which the complainant used them and that the ministry was quite well aware that the industry was in fact using the statistics in that way.

Madam Chairman: After Farm Q, and I think this is my final question, decided or found out that its pigs were not as superior as it had expected, what did it do to mitigate its loss? They slaughtered some pigs?

Ms. Morrison: Yes.

Madam Chairman: Were any other actions taken to try to solve their dilemma at that point?

Ms. Morrison: Their losses were well mitigated in this way: their breeding program with the pigs that they did not cull—that is, the pigs that were of high quality—was such that within about a year and a half the unit was up to the standard it would have been had all of the pigs been of high quality; that is, they slaughtered the ones they could not sell and bred the ones that were of high quality. My understanding is that a year and a half later the quality of that unit was superior.

Madam Chairman: Just in terms of date, is there an exact date of delivery of the pigs, in the summer of 1984, shall we say?

Ms. Morrison: The pigs were bred in batches and delivered in about June 1984.

Madam Chairman: So it was about six months after that he wrote the ministry? I think our document says November, that it was written in November and received in December 1984.

Ms. Morrison: I think that is right.

Madam Chairman: Whatever. At tab 20—I am getting lost under all of this paper, I am afraid. You may think it is a simple case and other people may, but we have so many volumes; let me just check.

The other thing, I think, was something Mr. Bossy brought up, whether there was any inbreeding going on at this time or whether that is something that is avoided. I think his question were that perhaps unit 6 was inbred and therefore you had a less superior quality because of that. Was there any question in your mind as to whether any of that may have occurred?

Ms. Morrison: And affected the quality of these pigs? No.

Mr. Bell: With respect to the so-called ROP data errors, as a result of your investigations, what did your office conclude caused those errors?

Ms. Morrison: They were caused by wrong readings by a technician, possibly using faulty equipment.

Mr. Bell: Is that a combination of human error and defective equipment?

Ms. Morrison: Possibly. We did not go into the very details of how the errors were caused because the ministry has never quarrelled with us that there were errors.

Mr. Bell: Did your investigation reveal when those errors and their causes were first known by the ministry?

Ms. Morrison: We understood that once the ministry discovered the errors, it was apparent that the errors had been in the readings for a number of years prior to 1983.

Mr. Bell: I guess another way of asking that is whether it was the circumstances of the complainant's discovery of the different readings that was the source of the ministry's knowledge of the problem or whether it knew it beforehand.

Dr. Lee: The ministry knew beforehand because the technician who was probing for farm 1 was away on vacation and the replacement technician came in with some different readings. That is when the ministry first became aware of the problem.

Mr. Bell: When was that?

Dr. Lee: That was in July 1984.

Ms. Morrison: July 3.

Mr. Bell: The complainant drew this to the attention of the ministry, if I am reading the material correctly, around October 1984?

Dr. Lee: I am not certain what the first date was that he brought it to the attention of the ministry.

Ms. Morrison: Certainly he had brought it to the ministry's attention in the fall of 1984.

Mr. Bell: I am sorry; I think the first indication may be early September 1984.

Ms. Morrison: In the ministry's material, there is a memorandum at tab 7 saying, "As I mentioned very briefly on October 11, I received a call...expressing concern about the assessment."

Mr. Dombek: That is October 12, 1984.

Mr. Bell: The chairman touched on this document during her questions and I would like to spend a little more time on it. That is tab 20, volume 1 of the ministry's material. Just for the record, I understand this is a letter

written about the problem by the complainant company to the then Minister of Agriculture and Food, dated November 29, 1984. Is that correct?

Ms. Morrison: That is right.

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Mr. Bell: In the letter, he sets forth certain matters of fact and chronology and on the top of page 2, in paragraph 8, he sets forth some information. Was this information known and considered by your office as part of its investigation and therefore implicit in the report or did something new come to your attention subsequently?

Ms. Morrison: We knew the ministry found out that the ROP statistics from Mr. C's probes were wrong when Mr. C was on leave and another prober performed his task. That is paragraph 8(a) on page 2. So we knew that.

Mr. Bell: I believe it is important for the committee to have, as precisely as possible, a chronology of when these things were selected, when they were delivered, as against when these different readings were known. Can you try and relate the selection and delivery to what is in number 8 as best you can?

Ms. Morrison: My understanding of it is this: The animals were delivered in June 1984. It appears Mr. C was away on vacation. From this letter it appears to be before that, although I had always understood it was after that. But this appears to be before that, because it appears he was on vacation when these very animals that were the subject of consideration were probed at farm 1. That seems to me to be what 8(a) says.

I would think the chronology goes like this: The pigs are ordered and bred and then Mr. C is on leave when he comes to probe, so someone else probes them. They are delivered and Farm Q, some weeks afterwards, has probes done in which it finds the results are very much out of line with what it thinks they should be.

Mr. Bell: Why would the pigs be probed after they were selected?

Ms. Morrison: The program is a regular one. Pigs are probed all the time. The statistics for such a program are no good if you just take a reading today and then never do it again. It is a regular program.

Mr. Bell: Mr. Dombek's point is well taken. Members of the committee, you should know that I have raised this paragraph with him. Overnight, he is going to make some inquiries to determine as far as the ministry is concerned whether the content thereof is accurate, and if so, to what extent, and what the dates are and who the individuals are who are referred to, because what that paragraph says is that there were two sets of indices available and the ROP in the language of this paragraph decided that the indices of—we have used his name; it is part of the material—McKee, the ones that were subsequently determined to be in error, were the ones that were used.

As far as your investigation is concerned, what if anything did the complainant do with the readings that were used, as referenced by paragraph 8?

Ms. Morrison: Which readings?

Mr. Bell: The readings that are referred to in paragraph 8, which ultimately were decided by the program to be McKee's. Okay?

Ms. Morrison: Right.

Mr. Bell: Your chronology says these probings were done after the animals were selected.

Ms. Morrison: My understanding was that the mistakes in this prober's technique or machine came to light when he was on vacation. It was my understanding, notwithstanding the paragraph at 8(c), that these had come to light quite independently of the purchase by Farm Q of animals from farm 1.

What this tells me is that, yes, that is true; it came to light quite independently when they had someone else probe instead of the regular prober, but at the same time, they later found out—and this is somewhat later—later it emerged, as they say, that the ROP program already knew about the mistake but decided that the measurements taken by the mistaken prober would be the ones which would be the official measurements for those animals in that herd. That is what that says to me.

Mr. Bell: All right, but my question is about the results as selected by the ROP decision, i.e., McKee's. Were those results made known to the complainant prior to delivery and, if so, what use did the complainant make of them?

Ms. Morrison: Did they know before the pigs were delivered that they were wrong? No.

Mr. Bell: No, no, that is not what I am asking you. There was a decision made to go with the original prober's results.

Ms. Morrison: This is an ROP decision—nothing to do with our complainant.

Mr. Bell: Yes, and your understanding by your chronology is that that decision was made after these pigs were selected for purchase. You told us that about three minutes ago.

Ms. Morrison: My understanding is that the complainants never found out about this decision until after the pigs were delivered.

Mr. Bell: No, no. I appreciate that, but please put that away. My question is, did the complainant use these results, i.e., McKee's results, in any way connected with the purchase of the pigs?

Ms. Morrison: Yes. Those were the results that they relied on. They had no idea that there were any other results. They used McKee's probes, the wrong ones, based their purchase on the wrong ones, had the pigs bred on the basis of the wrong ones and found out afterwards that not only were they wrong but, according to this paragraph, people knew they were wrong.

Mr. Bell: If your understanding of this chronology is correct, do I take it that when the complainant made the selection of the animals, using in whatever way the ROP results, there was another set of results available somewhere?

Ms. Morrison: Not at that time. The confusion comes because the

selection is made quite a long time prior to the breeding and the delivery of the pigs. At the time the selection was made, there was a set of figures. They picked their pigs. They had them bred according to the ranking, and it appears to me that what happened after that was that McKee was on leave and another prober went to farm 1, where the pigs still were because they had not been delivered yet, probed those pigs and got a different value. The pigs had been chosen, but they had not been delivered yet. That is my understanding of this chronology.

Mr. Cureatz: They had been chosen and bred?

Mr. Bell: Then the different set of results, as apparently referenced by paragraph 8, arose after selection but before delivery?

Ms. Morrison: That is right.

Mr. Bell: It seems to me to follow that what recourse would C have had had he known of the other set of results?

Ms. Morrison: C?

Mr. Bell: The complainant.

Ms. Morrison: He did not know.

Mr. Bell: If he had known of the other results, what recourse would he have had?

Ms. Morrison: Once he had chosen and had the animals bred, he would not have very much recourse.

Mr. Bell: That is right. That is what I am trying to get at. The fact that there were apparently two sets of results in existence at some time before delivery does not seem to make any difference to your case.

Ms. Morrison: It just confirms that not only were there wrong statistics but it was known that the statistics were wrong some time prior to delivery of the animals. That is what you understand?

Interjection: Sure.

Mr. Bell: Okay.

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Madam Chairman: On this point; Mr. Charlton?

Mr. Charlton: I think it has been answered now.

Mr. Bell: I just want to nail down as much as we can the number of times and for what purpose this record of performance data was used by the complainant. We touched upon it this morning, and the touching upon was in reference to the chart that still stands.

First of all, did the complainant use the general herd average data in selecting herd 1 as one of the herds from which it would acquire pigs?

Ms. Morrison: Yes.

Mr. Bell: Right. Then the complainant used the individual pig data within herd 1 to select the best of that herd. Right?

Ms. Morrison: That is right.

Mr. Bell: Then I think I heard you say that there was some reference and use of the data when the decision was made to select pigs for breeding?

Ms. Morrison: Right.

Mr. Bell: Tell us about that. What was that?

Ms. Morrison: It is easier for me to think in terms of somebody having a certain set of marks, say. Having decided that people above 70 per cent average would be good candidates for this—whatever you are doing—then the next set of decisions that are being made, the breeding decisions, are analogous, I think, to picking sets of two, for example, out of those people who will do something.

In the pigs' case, what they are doing is saying: "We've got this set of good pigs. Now, we want to use the very best ones for purebreds and we want to use some other ones for crossbreeding." Whether that is the right order around, it does not matter; but the point is, "we want to use some known, very good pigs for one purpose and the not-very-good ones for another purpose. In order to do that, we have to know which ones are the good ones and which ones are the not-very-good ones. Even though they are all good, some are better than others."

The problem is that if those numbers are all wrong, you may very well know that they are all above 70 per cent, but you do not know who is the 95 percenter and who is the 71 percenter; and if you wanted to get the 95 percenters together or the 95 together with the 94, and the numbers were all wrong, you would not do it right, and here it kind of matters.

Mr. Bell: Okay.

Mr. Charlton: I would like to go back to some of the questions which Mr. Bell was asking earlier; back to this paragraph 8 situation. First of all, I want just to clarify absolutely clearly that although at this stage when the events that are described in paragraph 8 were occurring there were in fact three sets of results available on herd 1, only one of those sets of results was ever published or made public, and that was the original results.

Ms. Morrison: The official results.

Mr. Charlton: Yes, so that there was no public awareness of the other two conflicting sets of tests.

Ms. Morrison: I understand that there were the original official statistics. Then another prober came and probed them, and those results were inferior, so another prober was —

Mr. Charlton: So we have two conflicting sets conflicting with the official ones?

Ms. Morrison: They might not—you should remember that they might not —

Mr. Charlton: They were not necessarily conflicting with each other; they were conflicting with the official ones.

Ms. Morrison: The other thing is that they may not be whole sets; they may be sample probes to try and find out—like, take a pig—

Mr. Charlton: Fair enough. All I am asking is whether or not those results were ever available to anybody other than the ROP.

Ms. Morrison: Not that I know of.

Mr. Charlton: So that the complainant in this case had, at this point, no knowledge of those results before he accepted delivery?

Ms. Morrison: That is right; as far as I know.

Mr. Charlton: Mr. Bell asked what choice the complainant would have had if he had been aware of those results at the time at which they were discovered. Had the complainant at that point paid the total cost of his commitment to farm 1?

Ms. Morrison: I am not sure, but I think farm 1 could very well have argued that it was not its fault that the statistics were wrong and that the complainant should look to the ministry.

Mr. Charlton: I think that is fair, but just in terms of my question about whether the complainant had a choice or not, if he had been aware of those inferior results, which he was never made aware of until later, he could have refused delivery? He could have refused to pay, perhaps, and then it is somebody else chasing somebody else for money instead of him chasing somebody for money?

Ms. Morrison: Possibly.

Mr. Charlton: You are not aware of whether he had paid the whole bill at that point and, therefore, whether he had any option at all even if he had known?

Ms. Morrison: No, I am not.

Mr. Bell: I just want to talk for a couple of minutes about the criteria used by the complainant for the selection of these animals. You do not assert that the ROP index was the only criterion?

Ms. Morrison: That is correct.

Mr. Bell: There were a number of others. For the committee's assistance, can I just summarize what they were? There was the health status of the animals. The requirement was that they all be within the excellent health status, which is a term of the industry and I guess a term of the ministry and the department, provincial and federal.

Ms. Morrison: That is right.

Mr. Bell: There was a requirement of physical inspection. The animals had to pass a physical inspection by somebody undertaken on behalf of the complainant.

Ms. Morrison: That is right.

Mr. Bell: There was pedigree, which I understand is purity of bloodline or whatever the equivalent is in the swine industry.

Ms. Morrison: It is knowledge of ancestry, pedigree.

Mr. Bell: That is always represented by a certificate, I understand.

Ms. Morrison: That is my understanding.

Mr. Bell: Last, there is the ROP index.

Ms. Morrison: That is right.

Mr. Bell: It is basically four.

Ms. Morrison: Five if you count the ROP index as two things, that they had to be thin and fast-growing.

Mr. Bell: I have lumped them together. Did any one of these criteria have overriding effect or status over the others?

Ms. Morrison: I think that is almost an irrelevant question in this respect: They were looking for a high-health-status herd and they were looking for pedigree. If you find a herd that has both of those things, then you say: "Okay, I have two herds. Both are high health status and both are pedigreed. How am I going to choose the animals from them?"

The problem is that they did not want pigs that did not have all of those things. It would not have been any good to say, "Well, we can get these very thin, very fast-growing pigs over here without pedigree," because they wanted a pedigreed herd. They would not have bought them if they were not pedigreed. On the other hand, to get high-health-status, pedigreed pigs which were fat and slow-growing was useless. Having found that there was a herd with pedigree, high health status, it was very important to them that from that herd they could get lean, fast-growing pigs.

Mr. Bell: Fundamental to your report and recommendation is the following: Had the complainant been aware of the so-called true ROP index, as subsequently determined or as subsequently determinable, it would not have purchased the 181 pigs it did. Is that right?

Ms. Morrison: That is right.

Mr. Bell: What evidence do you have that forms the basis of that conclusion?

Ms. Morrison: Our evidence is that the complainant asked for pigs of a certain high ROP standard and he asked for them to be ranked according to that standard so they could be bred accordingly.

If he could not get those, if he had not thought that the herd was so good because the statistics were this good, he might not have purchased from this herd at all. He might not have decided to set up the unit at all.

Mr. Bell: The word "might" is less than categorical, though.

Ms. Morrison: Of course, there were four different things the complainant was looking for, and the extent to which each of those was important has to be attested to by the complainant.

The complainant has stated that had he known that these pigs were the quality they turned out to be, he would not have bought them for his new unit 6. Secondly, had he known that they were mixed up in rank, it would not have made any sense to breed them the way he did.

Even had he chosen that particular herd because the ROP statistics were so good, even had he done that, even if we did not believe that he would not have made that decision, that he still would have gone with that herd, which was a very good herd, everyone agrees, he still suffered damage going with that herd by not being able to rank the animals appropriately.

Although that is an important question, it is not the only question to ask.

Mr. Bell: So, one, I did not get what I bargained for, and second, when I got what I did, I could not make the use of them that I should have had I known all of the information or had I known the true ROP index.

Ms. Morrison: That is right. Do not forget that he was trying to set up a herd to sell breeding pigs. When he finished, when he got these pigs, the pigs that were the result of this choice had to be sold for bacon. He was not trying to set up a herd of pigs to sell for slaughter. It is clear he did not want pigs that you could only sell for slaughter.

Mr. Bell: Okay.

Mrs. LeBourdais: I just wanted to further explore Mr. Bell's direction with regard to the time frame. First of all, what is the gestation period of a pig, six months?

Ms. Morrison: Ask one of the other people. Ask one of the ministry people.

Dr. Lee: It is about five months, I think.

Mrs. LeBourdais: Five to six months or something?

Interjection: It is 115 days.

Mr. Dombek: Did you get that for the record, 115 days?

Mrs. LeBourdais: I am just trying to get some sort of sense of the time. From when the decision was made to select the initial stock, based on the index, to the time the first litter was born, what kind of time frame are we talking there, 115 days plus another—

Ms. Morrison: I am not sure that it matters, but I will try to answer how it could happen. When you choose the pigs on index, you are choosing pigs which are not necessarily, as I understand it, ready to be bred right then, etc.

Mrs. LeBourdais: Right.

Ms. Morrison: What you are doing is finding pigs in that herd that are good pigs.

Mrs. LeBourdais: Have the potential.

Ms. Morrison: They grew fast and they grew not too fat in that time.

Mrs. LeBourdais: Yes.

Ms. Morrison: I do not know how much connection there is between how long it was after that that the first litter was born, because these pigs were chosen as being genetically sound for leanness and growth.

Mrs. LeBourdais: Okay.

Ms. Morrison: They then would be, as I understand it, bred in batches and delivery was taken some time later.

Maybe you can tell me more about what your question goes to.

Mrs. LeBourdais: I guess I was just trying to get a sense of what triggered the farmer to suspect the problem to start with, the numbers looked too good to others?

Ms. Morrison: No.

Mrs. LeBourdais: What was the first clue that made him suspicious? Was it the quality of the birth of the first litter or the numbers just did not seem to ring true? When maybe other people looked at them, they seemed too high?

Ms. Morrison: No. What I understand happened was that they had the pigs probed at their farm once they were delivered.

Mrs. LeBourdais: Any particular reason? Is that normal process to just do a verification on delivery, that kind of thing?

Ms. Morrison: My understanding is that the probing program is a regular program and it would not be unusual for them to have their pigs probed at their own farm.

Mrs. LeBourdais: Okay.

Interjection.

Ms. Morrison: Okay. They have to be probed before they reach 90 kilograms and some of them had not reached their 90-kilogram weight.

Mrs. LeBourdais: Okay. I see.

Ms. Morrison: When they had them probed at their own farm, they did not want to use the ministry prober, because he had a pig farm and they were afraid he might spread disease to the pigs they had chosen so carefully. They had someone else probe them. When that happened, the numbers they got were much different from what--

Mrs. LeBourdais: The discrepancy showed up at that point?

Ms. Morrison: Yes.

Mrs. LeBourdais: That was the first alert, rather than anything having to do with the birth of the first litter and the resulting quality of—

Ms. Morrison: That is right. That is my understanding.

Mr. Charlton: I would like to go back very briefly to the last set of questions Mr. Bell was pursuing and try to come at them from a slightly different angle so I can be sure I understand what the answers were.

What you said was that there was a range of criteria they used for picking the pigs, not just the ROP statistics. It seems to me that although the complainant is claiming losses here, when he found out what the real ROP statistics were or that there were major errors, he did not take all of those pigs out in the field and plow them under. Some were sold for bacon and some were kept and bred, as you suggested, and bred successfully.

In your conclusion and recommendation that the complainant be compensated, what is it you are viewing as the liability of the ministry, the losses that were suffered by the complainant as a result of knowledge about the ROP statistics? I go back to something you mentioned this morning—I think it was in one of the letters we referred to this morning—where you are essentially saying that the ministry felt the complainant should not have made it public knowledge that there was a problem with the ROP statistics and therefore might have been able to more easily sell the pigs.

Is that what we are trying to define here as a committee? Is that what we are trying to come to a conclusion on, that the liability you are recommending be compensated by the ministry is the liability which, however we calculate it at some point, is related to the faulty statistics and nothing else?

Ms. Morrison: That is right.

Mr. Carrothers: I just want to clarify something on the ranking. There were two things, I guess. First was the choice of the herd and then the choice of the pigs, and the second one was the breeding pattern that was chosen based on the ranking. Given that the machine was not working and there was some miscalibration or something to give wrong figures, how did that translate into a different ranking? Surely, even though the machine was misreading, each pig ranked against each other in the herd would end up in the same order. I am just wondering how that did not work or what happened there.

Ms. Morrison: The ministry itself has concluded that there was some misranking of the pigs because the back-fat readings were wrong. That is not just our conclusion.

Mr. Carrothers: I just wondered in my own mind. I could see that if the machine were misreading, you could say—

Ms. Morrison: It was not just a systematic error. I am not absolutely sure how it arose, but it was not just that the machine always read two millimetres high. Otherwise, there would not be any misranking; you are quite right. If it was just so much high all the time, then you would not have had this mixup. The ministry experts, both Dr. F and Dr. E, have agreed that there was a misranking of the pigs because the back-fat figures were wrong.

Mr. Carrothers: The explanation is yet to be given to us, then, I suppose, as to how that happened.

Ms. Morrison: I understand that the errors arose not just because the machine was reading always high or always low, but that the machine was not a machine that was designed for this particular purpose, and that there were errors by this particular technician. Otherwise, when the next technician did it, you would not have expected the results would be that much different.

If you look at page 76, for example, which is Dr. E's report, half-way down the page, in the middle of the middle paragraph, he says, "This would have resulted in some incorrect ranking of pigs for back fat...." So the errors were not just ones that would affect only the level of back fat; they were also ones that would affect ranking.

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Mr. Carrothers: It says "...and could have affected the result of selection decisions." I suppose the amount of this ranking is not clear.

Ms. Morrison: That is right.

Mr. Dombek: It will become clear.

Mrs. LeBourdais: One quick question: Do we have any idea of the difference in price of a hog that is sold for slaughter as opposed to for breeding purposes?

Mr. Dombek: That is very cyclical.

Mrs. LeBourdais: But are we talking about hundreds of dollars' difference?

Ms. Morrison: Yes.

Mr. Dombek: Again, it depends on the market. As Mr. Bossy pointed out earlier in some of his questions, it really depends on the time of year, the whole market and so on.

Mrs. LeBourdais: I appreciate that the market value would come into it, but still, are we talking—

Mr. Dombek: I am not too sure that there is a relationship, that you could say it is always two to one, or three to one, or something along that line.

Ms. Morrison: We have looked at some figures which suggest that market animals, that is, pigs for slaughter, were selling at one point, when we could compare them, for about \$130 compared to \$560 for boars that were breeding animals, \$225 for gilts and \$271 for purebred breeding animals.

Mr. Dombek: This is all new to me.

Ms. Morrison: You did not know that breeding animals sell for a higher price?

Mr. Dombek: No, these numbers are all new to me.

Mrs. LeBourdais: It just gives us kind of a feeling.

Mr. Dombek: I am a little concerned that the committee would get into that aspect of it. What I would like to know is what date, when these figures came and where they came from. I have no way of checking into them.

Madam Chairman: Perhaps Ms. Morrison will provide you with a copy.

Mr. Dombek: I think it is a little late in the day for that. I would like the committee to disregard them.

Ms. Morrison: Could I suggest that the ministry has experts on the breeding and selling of pigs. Probably they are quite aware that breeding pigs sell for more than pigs for slaughter.

Madam Chairman: I think it is a point we are going to have to look at at some point, both at the time that we are looking at and perhaps even now, comparatively. I think Mrs. LeBourdais's question, while it has elicited a disagreement among presenters, is one that I too, and I think many of us around the table may have been interested in. I think the committee should perhaps take with caution the figures that were presented, because Mr. Dombek has made his position quite clear that may vary from one month to another.

But I would like the committee at some point in the next three days to have before it an example, perhaps on a yearly basis, of what the variation would be. I think it is a valid question to know on average or at some particular time what the difference is between a breeding pig, male or female, and a slaughter pig. The two parties at some point have to agree on presenting that, just so that we, who are not experienced pig breeders, will know what the ballpark is.

Ms. Morrison: Could I suggest that the important time frame is the time at which these pigs were sold for slaughter as opposed to for breeding? We do not care really what the difference between breeding and slaughter prices are today. What we really care about is the difference between the prices for breeding and slaughter at the time the pigs had to be disposed of.

Madam Chairman: Maybe we could entertain the argument about the time factor at a later position in the argument. It is something that is going to have to come before the committee. I think that all of us just sort of did a quick calculation at four or five times as much. I would hate to prejudice the ministry's position in this regard, but somebody in the ministry at some point is going to have to come up with some idea for those of us who are not aware of this.

Mr. Dombek: Let me just caution you, Madam Chairman, and members of the committee. First of all, I think it is very difficult to find out what the difference was between these pigs being sold for breeding purposes and for slaughter purposes. We have no evidence. There is no evidence before this committee. There certainly has been no evidence presented to the ministry that any or all of these animals were slaughtered. In fact, and this is the caution, I will be presenting evidence that will show that if there was any culling done, it was fairly minimal and that the pigs that are currently being bred in unit 6 are from the original purchase. I would like to throw that out right now and perhaps ask for some direction.

Madam Chairman: Counsel may have an opinion. Just for a moment, can I have the agreement of both of you to say one thing before you jump in? I

think we should all treat with caution the figures that were presented to us, but I want to see something before the committee. If you two can agree on that, outside of committee time, I would like to see something.

Mr. Charlton: I do not disagree with what you have said. What you have implied and what you have said is that the committee is going to find liability. We may or we may not.

Madam Chairman: That is why I was talking about Thursday.

Mr. Charlton: I thought we had agreed earlier that we were going to deal with the question of liability. If we decide liability on the ministry's part, then we can deal with the question of costs. I do not think we need to get into the question of costs here today and have this argument, because we are going to hear the cautions from the ministry and the evidence from the ministry in terms of whether it thinks there were losses and whether those losses were in any way associated with the statistics and all the rest of that.

I think for the moment we can stick to the question of liability. If the committee determines there is liability on the ministry's part, then we can deal with the question of costs, and I am sure it will come up with them.

Madam Chairman: I agree with that, but if we do decide liability, I think the time frame in which we will require the information is very quick. That is why I think we should be prepared, in any event, or should have thought of it at this point. I think Mrs. LeBourdais just wanted to know if it was indeed always more.

Mr. Dombek: I think that is a good point.

Madam Chairman: And significant.

Mr. Bell: That was going to be my point. There is no doubt, and the parties will acknowledge, that there is a differential in the cost or the selling price of the two classes of animals. Whether it is \$150 in the spring or \$100 in the fall, frankly for your purposes, having regard to your decision to go with liability first, is now not pressing. I agree with the chairman that you are going to have to have some idea. I would put it under this basis, without giving calculations. You are going to have to learn from the Ombudsman what the Ombudsman's theory of loss is, not in terms of amounts, but in terms of how the loss was suffered. As I understand it, you are going to be hearing that a substantial portion of that loss has to do with the differential between what would have been a breeder for sale and a—what do they call them?

Mr. Cureatz: A weaner.

Mr. Bell: A weaner for sale. That is exactly what they call them.

I am not sure what Mr. Dombek is saying. Perhaps it is best to wait until we hear exactly what their information is as to what has been culled to date and what is being used for breeding purposes to date. In any event, it may go to the issue of damages and not liability.

Ms. Morrison, on the issue of warnings, the warning issue is in two categories as I understand it. There is a general warning issue; i.e., information published by the program, the ministry, to the farming industry as to the use of these indices. Is that correct?

Ms. Morrison: That is right.

Mr. Bell: Then there is the specific warning issue; i.e., what was given specifically to this complainant in respect of the use of the indices.

First, on the general, if you would go to pages 58, 59, 60 and 61 of your material, this is part of the ministry's initial position to the complaint. Do you have that?

Ms. Morrison: Yes.

Mr. Bell: At page 58, at the bottom, there is reference to ministry warnings "as expressed in the...handbook, in annual and biweekly reports and in fact sheets." Over the page, they then give a list of the publications that contain express warnings, and there is a list of annual reports going for a number of years. There is certain federal documentation, going over through page 60. Then, as I take it, there is even more listed at page 61 through the top of page 62. Did your office review all the warnings and all that material to ascertain what was in there?

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Ms. Morrison: We checked many of them; not all of them.

Mr. Bell: Just give us a description. What form did the warnings take?

Ms. Morrison: For example, in the Ontario ROP Swine Breeder's Handbook, which is mentioned at page 61, we state in our report at page 210 that the handbook stated on page 6, "The home test performance of pigs tested in different herds should not be directly compared."

As another example, in the swine annual report, the following statement occurred in a number of swine annual reports, "The following herd averages should not be considered as a valid measure of the genetic merit of the pigs tested in each herd."

Mr. Bell: Would you turn to page 197 of your material? Are you able to confirm that is the specific warning letter the ministry refers to in its material?

Ms. Morrison: That is right.

Mr. Bell: That letter is dated February 1, 1983. Following that letter is a letter from the complainant, at page 199, dated January 11, 1983. When you look at both of the documents, there is an exchange between the complainant and the ministry as to some aspect of these indices.

Ms. Morrison: Right.

Mr. Bell: Are we clear that this exchange occurred prior to the selection of this herd?

Ms. Morrison: Yes, we are. I could comment on the exchange just slightly.

Mr. Bell: Yes, please.

Ms. Morrison: The January 11 letter from the complainant to the ministry talks about the ROP between-herd comparisons based on test station data. We have not talked about test station data this morning in particular detail, but test station data are data taken from samples from herds at test stations, not measures taken at the home herd.

The complainant's question to the ministry was essentially one involving, "Be careful not to mislead people as to the value of that test station data for the comparisons you are suggesting they use them for, because without understanding how many were in the sample, the variability, etc., they might be misleading."

I think his point was, and certainly in hindsight it is easy to say, that the ministry was telling people not to use the test station data for between-herd comparisons. On the other hand, the ministry was also telling people to use the home test when they were buying gilts and boars from other herds. I think the test station question is quite a separate one and one in which he was concerned that because the test station data were poor—that is, there were not enough in a sample, etc.—people would be using them in error and depending upon them in error. Certainly, the ministry's response was to quote to him the sentence that precedes the home test data.

In our review of all the ministry's documents, we found that the ministry on the one hand was saying, "Do not use home test data to compare herds," and on the other hand, "When you go to buy something, make sure you know what the home test data are." We felt the warnings were inconsistent and that the ministry was well aware the industry was using the data in a way in which it relied upon it to be correct.

Mr. Bell: Just so we understand that, the so-called warning letter of February 1 does refer to home test measures and the use thereof. What the ministry said in this letter, as you understand it, is that vis-à-vis home test measures you ought not to take, for example, the general average for herd X and compare it to the general average of herd Y, because, as this letter sets out, you are probably going to be comparing apples and oranges.

Ms. Morrison: There would be management effects, that is right.

Mr. Bell: That is, you will not allow for the differences in feeding management, ventilation, accuracy of the scale, all of the other stuff.

Ms. Morrison: That is right. On the other hand, the complainant, when he saw the figures for herd 1, was so impressed that the figures were so good that they could not have been obtained unless the herd had genetic merit.

Mr. Bell: Where do you get that from?

Ms. Morrison: The statistics were so much better than the usual ROP statistics that the complainant, as he states, was convinced that the herd must have superior genetic merit.

Mr. Bell: Okay. The ministry raises the warning issue as one of its reasons for not accepting the recommendation. You come back and say the warnings have to be considered against what is the practice in the industry. The practice in the industry is that farmers are using these home test data for the purpose of selecting and purchasing pigs from other herds in the same manner as the complainant had.

Ms. Morrison: That is right.

Mr. Bell: What do you base that on? Where do you get that information from and what is it?

Ms. Morrison: For example, in Dr. F's report, which was part of the ministry's response, at page 166 I pointed out this morning some of his statements about the way in which the data were being used; the top of page 166 in particular, where he says, "Program managers, in Ontario as in other provinces, cannot be faulted for ignoring and minimizing the nonvalidity of between-herd comparisons based on home test results."

Mr. Bell: Yes, but is that where you get your information that this is a practice in the industry?

Ms. Morrison: Throughout his report he talks about the fact that because the station test results were considered to be of concern by many of the breeders because of low sample size, the program managers could not be faulted for using the home test data instead. He goes on to say:

"...small differences in adjusted fat, and hence of index, are widely perceived as infallible guides to real differences in potential genetic merit.

"This perception of infallibility is reinforced by the inclusion of test performance data"—this is home test performance data—"on pedigree certificates...and by other 'official' policies or practices."

The ministry, I think, recognized that the industry was in fact using the home test data in this way. There are two other points to be made. First, there were warnings about using the data. There were no warnings that the data might be wrong. There was never a question that these back-fat measurements were wrong. There was some question about comparing this one to this one, but not because either one of them might be wrong. The second point is that the herd that was chosen in this way was agreed by the ministry to have been a very good herd.

Mr. Bell: But aside from the custom in the industry and what the ministry's knowledge and participation in that is, if the warning was a good one it does not really make any difference if the data is wrong, does it? If you are told not to use the data, whether it be accurate or not is irrelevant.

Ms. Morrison: It would depend on whether the warning said on the one hand, "Don't use the data," and on the other hand said in the line right after it, "And when you're buying a pig, make sure you check its statistics."

Mr. Bell: That is a different issue. That is custom in the industry and—

Ms. Morrison: No. That is the validity of the warning, whether it was a clear warning or not.

Mr. Bell: If the warning is valid—

Ms. Morrison: And clear.

Mr. Bell: —given that premise. What information do you have that the ministry was aware of this custom in the industry? Are you aware of any steps they took either to discourage it or encourage it?

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Ms. Morrison: Dr. F, whom I was just talking about, was a ministry consultant. Certainly in the ministry's response, in which it supplied us with a copy of Dr. F's report, it seems clear in what Dr. F is saying that this was not something that had just started; this was something that had gone on for some time.

Mr. Bell: Okay. Last item: I do not want you to give us figures and I do not want you to do calculations and I am not interested in a formula; I am interested in that implicit in your report is a conclusion that the complainant likely suffered a loss. All right?

Ms. Morrison: That is right.

Mr. Bell: What is your theory of that loss? How was it suffered?

Ms. Morrison: The theory of that loss is that the complainant depended upon data which were produced and published and distributed by the ministry in choosing the pigs to set up his new breeding unit. Because the figures were wrong, the complainant got the wrong pigs and suffered a loss as a consequence.

Mr. Bell: All right. How is the complainant worse off in that scenario than he would have been had he selected pigs with accurate data or been aware of the accurate data? What has he suffered and how?

Ms. Morrison: If the pigs were as good as he thought they were, as good as the statistics said they were, then the progeny of those pigs would have been sold for breeding and not for bacon.

Mr. Bell: Therefore, is your theory of the loss the differential between what the progeny would have been sold for as breeding pigs compared to what they were actually sold for as less than breeding pigs?

Ms. Morrison: We have not looked behind the complainant's loss calculations, because we have never come to an agreement about liability. In order to calculate those losses, an evaluation would have to be made of what the pigs that the complainant got were worth compared to what the pigs that he thought he was getting would have been worth.

Mr. Bell: I am sorry. I guess I am not making myself clear. I just want to know what your theory of the loss is.

Ms. Morrison: Mr. Bell, it could have been, for example, that he got a breeding pig but not a very good one and that the breeding pig he expected to get, if the statistics had been right, would have been a pig worth eight zillion dollars. If the pig that he got, although it was a breeding pig, was worth only four zillion dollars, then that will be his loss. If in fact, instead of being a breeding pig worth eight zillion dollars or four zillion dollars, it was a bacon pig worth only one zillion dollars, then he suffered that loss. Those losses we have not looked into.

Mr. Bell: How do you know he suffered one then?

Ms. Morrison: He suffered a loss because he sold more of the pigs than he expected for slaughter than for breeding.

Mr. Bell: Okay. All right.

Ms. Morrison: He would not sell pigs for slaughter if he could sell them to breed them.

Mr. Bell: All right. In respect of the issue that he sold more pigs for slaughter than he would have otherwise, you have accepted implicitly the complainant's representations to you in that regard?

Ms. Morrison: They were too fat to sell for breeding; people would not buy them.

Mr. Bell: That is something you have accepted from the complainant?

Ms. Morrison: Yes.

Mr. Bell: All right.

Ms. Morrison: Someone determining damages could certainly get evidence about the number of pigs which were sold for slaughter and the number of pigs which were sold for breeding and what the fatness of those pigs was. We did not go behind those figures.

Madam Chairman: Are there any more questions from the committee before we press ahead?

Mr. Cureatz: Just following Mr. Bell's questioning, what about in terms of the losses experienced with the setting up of the operation, the physical plant, or did you not look into that? Is that what you are telling us?

Ms. Morrison: You cannot calculate losses all of the different ways and add them up. I think what we accepted as one way of calculating the loss was to say, "If you'd gone to all this expense of setting up the plant and gotten good pigs out of it compared to having to gone all the expense of setting up the plant and getting bad pigs, then the difference would be the loss."

I think it is important to understand that we have had a lot of discussion with the ministry about liability, and if the ministry felt the losses were zero, it would not have been anything to it to admit liability, because it could have said, "Sure, we are liable but the losses were zero." That has not happened.

There has not been any quarrel about the amount of the losses, because we have not come to any kind of agreement on liability. If I were in the position of a person who was being asked to pay for something but the cost was zero, I would say, "Sure, I'll pay." That has never happened.

Mr. MacDonald: I would like to ask a question as far as costs are concerned. These gilts were bought and did not probe properly, so Mr. Q was unable to send them as breeding stock. If they had been probed properly, with the right body fat, etc., not only would there be a loss as far as his selling those gilts, but also I would like to know whether he would have bred some of those gilts to sell the offspring as breeding stock, because there is a cost factor there if that were so.

Ms. Morrison: I think that is a little of what I was saying to Mr. Bell about trying to decide what the loss is. It will be a complicated

question of trying to decide what the product was that he got compared to the product that he would have had, had the statistics been correct. I think that is one of the factors that would have to be taken into account.

Mr. Bossy: I have a short question. In looking at the difference between A and A, and that sort of intrigues me a little, the A above would be what you would consider A-plus. That is the expectation derived from what the tests were upon that herd originally, herd 1.

Was it not then perceived that herd 1 had such a high expectation, which was really way out of the realm of being real compared to all the others they had looked at—and then a decision had to be made, because they went to herd 1 and they concluded that herd 1 was so superior that they then sent along and decided to spend \$1.8 million, based on a value put on by the ministry people, really, thereby causing this problem we have, and that proved not to be exact. The spread between the two As is what I would like to have defined. How big did you estimate that to be?

Dr. Lee: The first thing to note is they put a question mark there. What this spread represents is the difference between the average of the herd, according to the published figures. That is here. But those figures were wrong. The herd had an actual average somewhere up there. We do not quite know exactly where.

We can estimate that it is at least 2.4 millimetres, because there was a comparative test when it was discovered that technician C was making wrong readings. The following day his supervisor probed the same pigs as he did, and there was a difference between those sets of probes of about 2.4 millimetres. That is your minimum, because the technician knew on that day that he was being tested, so he would naturally make a special effort to read properly. But these results are based on his accumulated readings over several years when he was not under test.

Mr. Bossy: When you are looking through this whole deal, where you have the complainant being an experienced breeder, as far as I have to gather—if you have been in it for years and have thorough knowledge about the hog operation, to see that one herd sticks out like a sore thumb as being superior, and thereby sort of draws you there to buy the stuff, would you not have been suspicious? Did you not question that of the complainant, to find the figures that were published? Even though they were published, they would have been suspiciously out of line with others, even the average being out.

Ms. Morrison: He had no reason to suspect that the figures were wrong. He had no reason to think the ministry was publishing figures that it did not have the confidence were correct.

These figures were not set by the farm that was selling the pigs, these were ministry figures. The ministry has no particular reason to make the figures very high, very good, so he had no reason to suspect that the ministry, in measuring farm 1's pigs, would have given them good values.

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Mr. Bossy: In other words, he is very confident that the government people who worked on these jobs are God themselves and you can trust the ministry.

Ms. Morrison: In a number of the ministry's bulletins and documents,

they urge swine breeders to use these statistics.

Mr. Bossy: As a guide.

Ms. Morrison: To buy, right.

Mr. Bossy: But generally, all these pamphlets, if you look through them all, they are a guide and they have been a guide, whether it is in buying, setting up hog operations or feeding operations or spraying operations. I am talking farmers all the way through. We have this going all over, and one little mishap on a recommendation—I have made many recommendations in my lifetime. Some have proven to be not quite up to what we expected, but it was always conditional. The recommendations we made were conditional that everything else was met.

This here could be too, really, because I still go back to the management part as being such a vital part of the operation here. There can be the slightest change of feeding, the climate in the building, all these things have effects on animals. They have on human beings, but they do also on animals, and I believe that element exists here, so that I am a little—to put all the faith in the testing that, as a person, and I place myself in the complainant's position, who is going to spend \$1.8 million, nearly \$2 million, and not thoroughly, but thoroughly, recheck, because probing could have been done again, a second probe of that herd to make sure it was right for the purposes, but he took the first figures that the ministry was saying.

Ms. Morrison: No, the ministry's figures are over a long period of time, they are not just one day's probes or one week's mistakes. The figures they are relying on are the figures which have been taken over a number of years on this particular herd.

Mr. Bossy: In other words, what he bought in these here, though, is you get what you see on that day. For the ones he got, they have become part of an average and they could be the very low part of it.

Ms. Morrison: No, he chose the very top ones from that herd. The point was that the herd average was high and then he said: "I want only the pigs which are above the herd average by this much. I want the ones that are up here." He was asking for the best ones.

Mr. Bossy: You are saying that there are now still that many of these pigs in the operation number 6 that are still there from the original herd. They are breeding and they have been culled, I have to understand from what has been said. If they have been culled, in other words, removing the lower part, and then with the upper part they still are nowhere close to what the—is that the idea?

Ms. Morrison: No. Now they are an excellent herd.

Mr. Bossy: I thought I read that they are somewhat superior even to their own barn 3.

Ms. Morrison: That is right.

Mr. Bossy: So there is a difference between the two barns.

Ms. Morrison: That is right.

Mr. Bossy: So circumstances there—

Ms. Morrison: But they did not live up to expectations in the first year or the first year and a half.

Mr. Bossy: Management and feeding, and there are so many things to come into play in that area that—anyway, we will look into it.

Madam Chairman: Thank you, Mr. Bossy. Are there any further questions from the committee before the ministry begins?

Mr. Cureatz: I am spurred on by the in-depth questions, and I feel that it is so much of interest to me, being a humble lawyer from Kendal, Ontario. Back to Mr. Bossy's inquiries—

Madam Chairman: Does that mean you wanted a question, Mr. Cureatz?

Mr. Cureatz: Yes, it did, as a matter of fact, because what I was curious about is the statistics and relying on the long-term aspects of these statistics, as I understood you to say. So a specific probing at the time of purchasing the swine would not necessarily indicate the overall long-term statistics of the probing.

Ms. Morrison: The program is set up in such a way that a regular measurement of back-fat thickness and growth rate is done to combine for this index. My understanding of the program is that like a lot of programs which are based on serial measurements, it is only any good if it is an ongoing program. The program sort of proves itself over the years in that way. I think that is what we mean by relying on statistics and on this particular probe over a number of years.

Mr. Cureatz: Would there be any other reason, specifically when you are purchasing the swine for this kind of production, for using those statistics?

Ms. Morrison: You would use them to perhaps choose breeding within your own herd. I think the point is that you cannot just go today and measure the thickness of fat on the pig, because that will not tell you anything.

Mr. Cureatz: That is right, and that is what I have been trying to centre in on. I think you have responded that you were relying on statistics over a period of time.

Ms. Morrison: They reflect not only how thick the fat is but how fast the pig grows; so if you go to measure him today, you might be able to say, "He's only this thick," but you would not be able to relate that to how fast he was growing.

Mr. Cureatz: Is there any other reason that you would have to rely on those statistics? A purchaser buying looks at those statistics being provided by the Ministry of Agriculture and Food. For what other reasons would a purchaser look at those statistics, outside of those areas that you have indicated about how fast they grow and the thickness?

Ms. Morrison: As far as I know, that is what they would look at them for.

Mr. Cureatz: That is what they are looking at?

Ms. Morrison: That is what they are for.

Mr. McCague: Is there in any of these documents, Mr. Bell, a chronology of events as they apply to the purchase of these animals?

Mr. Bell: No. The only chronology that exists in the documentation is one provided by the ministry in volume I of its material in tab D at the beginning. It is both a documentary chronology and an event chronology. It is actually quite extensive and very well done.

Regrettably, it starts on August 27, 1984. I do not say regrettably as a criticism of the ministry; I think, in fairness, that is when they first became involved in this matter. But it does not relate prior thereto; i.e., to the specific chronology around the selection of the animals in question and the delivery, and further, the various tests and test results that were available at any one period of time.

As far as I am concerned, there are two critical periods: the period of the selection and what was available then, and the period prior to delivery and what was available then.

Ms. Morrison: I think there is one thing to bear in mind in terms of the chronology. The ministry has never quarrelled with the fact that the statistics caused misranking of the pigs which were purchased.

In other words, the question about timing of the probes or any of that has not been part of a detailed concern because we have never had any quarrel with the ministry that the pigs' measurements were wrong and that that caused some misranking of the pigs which were bought by Farm Q.

So to some extent, although I regret I cannot say "They ordered them this day and they bred them that day and they delivered them the next day," there has not been any quarrel from the ministry that the statistics are wrong, that the statistics have caused misranking of the pigs.

Mr. Cureatz: It just would have been helpful for us to follow along with that.

Mr. McCague: For a trained mind, fine, but for untrained minds like mine, I think it is helpful to follow how those things all happen.

What kind of pigs were these?

Ms. Morrison: A number of different pigs. Allan?

Dr. Lee: Yorkshires, Hampshires and Durocs. Most of them were Yorkshires.

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Mr. McCague: Madam Chairman, I just want to ask a question and maybe the answer can come tomorrow. Regarding the Ministry of Agriculture and Food submission volume I, tab 1, in the second paragraph you mention that the variation for the Yorkshires and Landraces, which is used to calculate the indices, in your herds averaged only 0.92 millimetres, while the average variation for the other technicians was 2.06 millimetres. That figure must have some relevance and probably has some relevance to the chart that you have here. Maybe somebody might be creative enough to superimpose those figures on that chart or a chart like that for tomorrow.

Mr. Dombek: Well, at least we can offer you an explanation.

Madam Chairman: Anything else from the committee at this time? Do you want to make a summary at all, Ms. Morrison; or you will have an opportunity after, is that correct?

Ms. Morrison: Thank you.

Madam Chairman: Mr. Dombek, would you like to make a—

Mr. Dombek: Could I just get a glass of liquid?

Madam Chairman: Please. I am sorry that the room has been set up so that you are all very cosy there, but it might help the case.

Mr. Dombek: Perhaps I will also ask Dr. Pettit to join me.

Madam Chairman: Come on up. My understanding is that Mr. Dombek would like to make some opening statements and then go into whatever information he has to offer.

Mr. Dombek: As we are all aware by now, this is a tale of some pigs. It is also a story of contrasts, though. It is not the story of the naïve farmer; rather, it is the story of the sophisticated, knowledgeable pig breeder. This is not the story of an indigent individual; rather, it is a story of one of Ontario's largest pork producers.

This is not the story of a person with no business experience; rather, it is a story of an experienced business person who made a series of commercial mistakes. This is not the story of an unscientific operation; rather, it is the story of a business enterprise that had an animal geneticist as a resource.

This is not the story of an individual who slavishly agreed with the intent of ministry statistics; rather, it is the story of a person who questioned those very same statistics. This is not the story of an unadvised farmer; rather, it is the story of a hog breeder who was specifically cautioned about the record of performance data. This is not the story of a person who totally relied on ministry statistics; rather, it is the story of a pork producer who considered a multitude of factors in purchasing his animals.

This is not the story of a firm business contract between the complainant and a vendor of pigs; rather, it is the story of an agreement so meaningless that it allowed the vendor to sell almost any pigs he wanted to the complainant. This is not the story of a claim that can be easily established, as we have noted; rather, it is the story of claims that have varied in amounts ranging from \$1 million to \$400,000.

This is not the story of inches, but it is the story of millimetres; in fact, fractions of millimetres. Just to keep that in perspective, the top line of this diagram is one inch. The second pink dot is one millimetre.

Mr. Bell: I can't see it.

Mr. Dombek: I will pass it around. We are talking, with that figure on the board, of 0.3 millimetres.

Finally, this is not a story of a total financial disaster, but rather it is a story of pigs that have subsequently performed extremely well.

I plan today and tomorrow to spend some time refuting my colleague's claims and then present to you the ministry's position.

In this regard, I have in attendance, as I indicated earlier, two or three individuals who can assist the committee. They are Dr. James Pettit, the director of the animal industry branch, who is sitting immediately on my left; Dr. Brian Kennedy, professor at the University of Guelph, and Dr. Ron Urquhart, who also works for the Ministry of Agriculture and Food in the animal industry branch.

I think at this time it would be useful to have Dr. Pettit explain some background about the record of performance program; that is what the ROP acronym really means.

Madam Chairman: May I just interrupt for a minute? Approximately how long would you say this explanation without interruption would take, just so the members would hold their questions if they thought it was coming-

Dr. Pettit: I would suggest less than 10 minutes if there are no questions.

Madam Chairman: I suggest we give him the 10 minutes or so and not interrupt with questions. Then we may get through it and understand the process and the program.

Dr. Pettit: The record of performance, or ROP, program for swine is one of four genetic programs that are run as federal-provincial programs, the others being in beef, sheep and dairy cattle. The one in dairy cattle has been privatized and is being run by a private organization at present.

The program started back in the 1920s, but for the discussion for today, the current ROP program commenced in 1967 with the home testing of males or boars. This was followed in 1969 by home testing of gilts or females and in 1972 with the station testing component for boars from producers who were on the home test.

Various improvements have been made over the years and by 1983, the time we are talking here, the program was operating as a joint federal-provincial program; I will describe the various committees and organizations shortly.

The purpose of the program, as has been said earlier, is to assist Ontario swine breeders in improving their breeding stock by performance testing programs which effectively evaluate the genetic merit of potential breeding stock for back-fat thickness, for rate of gain and, in the case of station testing, for feed conversion.

One of the important things to keep in mind, and I think it was alluded to this morning, is that back fat is 50 per cent inherited; therefore, selection for back fat can cause improvements in a fair hurry.

The program is organized federally and provincially; it receives recommendations from two committees. There is a national advisory board that is composed, under Agriculture Canada's auspices, of breeders, provincial and federal employees and pork producers. They lay out the overall program development testing policies for the country. A provincial committee is also in existence. This makes recommendations regarding the details of the ROP test station program in Ontario to the ministry and has to work within the framework of the national policy.

In 1983, there were two components of the program. One was the home test and the other was the station test, program A. I should state that there was a program B as well, which I will not refer to because it was not involved with the situation.

Program A was designed for the 200 or more purebred breeders and breeding companies that sell breeding stock to the other commercial producers and breeders in the province. That can be, according to the pork board figures, up to 15,000 commercial producers, but really 5,000 to 6,000 serious producers.

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The breeders on program A are required to participate in the two components of the program: namely, the test station, which is operated by the Agriculture Canada, and the home test, operated by OMAF. In addition, all participants in the ROP must participate in the Ontario swine herd health policy. I will talk about the components.

There are approximately 1,500 boars a year tested at the New Dundee test facility in Ontario. We have one facility at New Dundee. The different breeders bring their pigs together at that facility, and they are raised under the same management system. This allows young animals at standard weights to be tested for back fat, daily gain, etc.—age to 90 kilograms—and feed conversion.

The results of these tests are published in the farm press and indices developed by the use of a standard formula that allow the pigs to be ranked. The index has equal weight for back fat and for growth rate.

The measurements in 1983 at the test station were taken by Agriculture Canada employees. That has changed now and OMAF employees are doing that.

The home test program: Technicians employed by OMAF visit the various breeders, weigh and measure for back-fat animals—that is, between 168 and 230 pounds—using ultrasonic equipment for back-fat measurement. This information is both left with the breeder and sent to Agriculture Canada for the development of a national database and for the production of official records. The ministry also publishes information, as was mentioned earlier, on both the home and the station test animals on a biweekly basis.

Since home test results are not comparable between two or more breeders, because of the difference in management systems, the ministry produces instructions, and I think we alluded to a number of publications, that describe the proper use of that information. These instructions are intended to assist both the breeder with the improvement of his stock and the purchaser once the purchaser has decided where that purchase is going to occur.

The information provided by the comparison at the test station is valuable for ranking the individual breeders. In other words, a number of pigs from each of a number of breeders are brought together, raised under similar management conditions and then measured and indexed. From that information, the station testing information one can select breeders that have good genetic stock.

The results of the home tests, as I said earlier, cannot be used to compare different breeders, because of the feeding, the management, disease and other conditions in each of these places. The published ROP data can only

be used for the purposes intended, and all participants are made aware of this through the handbook that is given to each participant plus the ministry's publications.

The ministry produces biweekly reports that include the results for all the better pigs tested, for one major reason: breeders can select these animals for their own breeding program. But also if they are looking at pigs, after they have used station test results to select a breeder they want to buy from, then they are to use the home test information to decide on the best animals in those herds. The reason the ministry publishes all that information is so that the purchaser has access to all the information that is available.

Moving shortly to the swine herd health policy, there are three active classifications in the health policy: basic, good and excellent. Only pigs derived from Ontario-source pigs can enter into the excellent status immediately. Pigs from outside the province must go through a series of monitoring procedures and be free of a number of diseases before they can get into this élite area. In 1983-84, there were 14 excellent herds in Ontario.

It should be stated that our experience with "minimal disease equals excellent animals" shows that in a new environment, animals from such a herd will be fatter than expected. That is not genetically fatter; that is fatter due to the management situations in that barn. The animals are not having to cope with a great number of disease agents, for instance, and they grow very fast and they gain more weight than one would expect. This effect is not related to genetics, as I said earlier, and it usually shakes out in one or two cycles of animals through a facility.

The record of performance program has been an extremely useful tool for the Ontario industry. The consumer demand for leaner pork was realized early. Our program quickly reduced the amount of fat on our breeding animals, and through them, our commercial industry. Just as an example, in 1972, the average back fat at the station test was 19 millimetres. In 1987, it was 12. Similar results are in other testing as well.

Studies done by the ministry in 1983 confirmed that for every dollar we spent on this program, approximately \$5.60 was realized by the producers, an additional \$1.2 million in revenue from 1981 to 1982. In addition, with 27 per cent of our production going to the lean-pork-hungry United States, another \$170 million is added to our economy. Almost all of these improvements in sales can be related to the superiority of Ontario pigs. One of the more important aspects of making them superior is this line ROP program.

I was going to talk a little bit about index. Index in both the home test and the station test is designed to rank animals. It is developed on the basis that the animals are handled under the same management situation. In other words, we exclude management effects of fat. What we are looking for is the genetic effect of fat. This is why, as I said earlier, only animals raised under the same environment, whether they be animals in the station test or the home test, can be directly compared.

Each of the indices that are produced in a group of animals will fall somewhere between 50 and 150, with a possibility of up to two per cent falling outside that range. In other words, it is a bell curve, with the average animal being at 100. Those superior for back fat and daily gain will be over 100. Other things, of course, as was said earlier, about pedigrees and breeder

reputation, price and health would also play a part in the purchase of particular animals.

I guess that is where I will stop.

Mr. Dombek: Dr. Pettit, Mr. McCague has some questions. I know that he knows, and Mr. Bossy obviously knows, what kind of pigs we are talking about, but I understand you have some pictures for members of the committee.

Dr. Pettit: Yes.

Mr. Dombek: Perhaps we could have a moment here.

Madam Chairman: Just a picture of a pig and a certain kind of pig so that we will know the difference between a Yorkshire pig and—

Mr. Dombek: —a Landrace, a Duroc and a Hampshire.

Dr. Pettit: Do you want me to pass it to them?

Mr. Dombek: Sure.

Madam Chairman: I think Sam may want an extra one of these for his personal file.

Mr. Cureatz: That is right. I would like to take one home.

Dr. Pettit: I could send this one around too. These are supplied by the Elanco Co. I should give them the credit, but we did take their advertisement off. The pigs that were referred to by the Ombudsman's staff earlier were the Yorkshire, number 10—

Mr. Dombek: That is in the right-hand corner.

Madam Chairman: Left to right?

Dr. Pettit: Yorkshire, Duroc and Hampshire, down here. Was Landrace mentioned as well?

Mr. Dombek: If there are some general questions members have about the general aspect of the program, without getting into the actual facts of the case, I think Dr. Pettit would be more than pleased to entertain them. Then we can continue on with the rest of our submission.

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Madam Chairman: Yes. If committee members have anything specifically to do with the programs, they could ask those questions now and reserve the other questions to the general argument as a ministry.

Mr. Lupusella: You have been mentioning the stature of the ROP program, which is a program the federal government has to do with, along with the provincial government. Hypothetically speaking, if there were to be liability, why should the Ministry of Agriculture and Food be responsible in view of this cost-shared program?

Mr. Dombek: I am not too sure Dr. Pettit is really qualified to answer that question. It is certainly one of joint jurisdiction, Mr. Lupusella.

As I understand the program, if I am a pig breeder and I want to breed pigs, I would go to the federal part of the program to select the breeder I want to use. I will look at those animals there that are at New Dundee at the test station, and again this is the federal part of it, and I will say, "Okay, I want breeder X," or, "I want breeder Y or breeder Z." That is where the federal aspect of it comes in.

The provincial aspect then comes in with the actual testing of the individual pigs at each breeder's home base, if you want.

Mr. Lupusella: Home testing program.

Mr. Dombek: At his home farm, right. Then, as I understand it, once I have picked breeder X and I want to go and buy his pigs, I would then go and choose the pigs at his farm from the particular unit or barn where all the pigs I wanted were. I would specify an index of some sort, indicating whether I wanted to have purebreds or crossbreeds or whatever the case may be, and I would then select those pigs based on a number of criteria. That is how the provincial aspect of it is, the actual testing of the back fat.

As I understand it, and I think what the Ombudsman's contention is, there was nothing wrong with what Agriculture Canada did. They did their job adequately and so on and there was nothing more to do. The problem occurred with the errors in probing that were done by the ministry technician. We have always acknowledged that, that there were these errors, but we do not think the errors were significant among other things.

I guess the short answer to your question is that the way the Ombudsman has framed it is that it is based on the Ministry of Agriculture and Food's particular problem. It was not the overall problem.

Mr. Lupusella: Okay. Thank you very much.

Mrs. LeBourdais: Am I correct in assuming that the purpose of having an ROP ranking system is for the purpose of ranking swine?

Dr. Pettit: Yes, it is to rank the best pigs with regard to back fat or growth so that the breeder then can select the best animals, cull the poorest animals and improve his herd.

Mrs. LeBourdais: If that is so, presumably those statistics and that indexing system is produced to assist farmers in purchasing their swine and in purchasing the best they can.

Dr. Pettit: Either to improve their herd itself—

Mrs. LeBourdais: To start or to improve?

Dr. Pettit: Yes, or to purchase.

Mrs. LeBourdais: When the initial error came to the attention of the ministry, what action did the ministry take?

Dr. Pettit: Should we start on that?

Madam Chairman: Do you have a question at this time?

Mr. Dombek: I was asking the committee's indulgence to perhaps limit this part of the questioning just to the general aspects of the program.

Mrs. LeBourdais: Of the program itself?

Mr. Dombek: Then we can get into the specifics later.

Mrs. LeBourdais: Okay.

Mr. Dombek: Thank you.

Mrs. LeBourdais: So be it. I have one more question then. I can understand that a program has to be set up in a certain matter that has a base, if you will. Once the pigs are purchased by an individual farmer, I assume you can no longer control the factors of whether he is a good farmer, whether he will provide adequate feed, the right type of feed, the right type of environmental conditions for the development of good hogs, unstressed animals, which might affect fat content, or whatever. You can control or help determine a base for the genetic part; you cannot control the other.

Dr. Pettit: Exactly.

Mrs. LeBourdais: Then it seems to me that if you have a system that does not allow for that factor, each person who purchases from you can have anything and everything go wrong or anything and everything go right.

Dr. Pettit: They are not purchasing from us; they are purchasing from other breeders. But maybe I can—

Mrs. LeBourdais: I realize they are purchasing from other breeders, but to me the crux of this is that scale, and it seems to me that there is a lot in question. You are saying farmers should not entirely rely on that scale, but for what purpose does it exist if it is not exactly for that, perhaps in combination with the expertise of the farmer to look at those other factors, such as conformity and that kind of thing we talked about, and then hopefully their expertise in appropriate environment, feed and all those things?

Dr. Pettit: It is just a guide, as was said earlier.

Mrs. LeBourdais: But just how iffy? Suppose I were a farmer and I came to you and I chose on the basis of conformity and those other qualities we talked about earlier and ignored the guide. I would not be a very good farmer, it seems to me, if I looked at those other factors but ignored this scale.

Dr. Pettit: The scale from the test station results of Agriculture Canada.

Mrs. LeBourdais: In other words, your published statistics.

Dr. Pettit: That is Agriculture Canada's program, but yes, the statistics that are published.

Mrs. LeBourdais: Really, then, you are saying it does have merit and

it is valid and it is something a farmer should base a good portion of his decision on.

Mr. Dombek: Not necessarily a good portion. It is certainly one of the things he should take into consideration. Again, it is only done once the farmer gets to the particular breeder he has chosen, using the Ministry of Agriculture and Food statistics. He will use a number of factors, which we heard earlier today. He will look at their pedigree, at their health status—I brought a brochure on the Ontario swine herd health policy. There are a number of different health statuses: good, excellent and so on. He will look at that. If we can use the term, he will eyeball the pigs, and if there is one with a funny ear or something like that, he may eliminate it just for personal reasons.

That is the kind of thing that will happen. But if you want to get into the excellent breeding of pigs in this province and to sell to other producers, you have to belong to the swine herd health policy.

Mrs. LeBourdais: My point is that once you have looked at it, eyeballed it, taken into consideration the conformity of the animal, the lack of disabilities, etc., would you not be rather foolhardy to make those eyeballing assessments but not take into consideration the statistics?

Dr. Pettit: That is right.

Mr. Dombek: Yes, and we have always said that.

Mrs. LeBourdais: Therefore, your statistics have substantial value, perhaps 50 per cent plus in making your ultimate decision.

Mr. Dombek: I am not too sure where we heard that figure, the statistics being 50 per cent plus.

Mrs. LeBourdais: I am just throwing it out.

Mr. Dombek: I do not think the statistics have that much of a value. Right now, Dr. Pettit has the microphone. Would this be a better question to ask Dr. Kennedy?

1600

Dr. Pettit: I am trying to answer the question. If you were a pig producer and you wanted to buy elite animals in the province, the information that is published, that was published in 1983-84 at least, would lead you to a certain number of breeders whose animals were performing well at the test station in New Dundee. You would then look and see the type of animals, whether they were purebred, the breed, the health status of the animal, and then you would say, "Okay, I want a Duroc, excellent health."

There might be three people in the province who produce those. You would then look at the test station results from those three people to see where the better genetics were. Once you decided, you would look at the results from those three people's home test stuff, all of their home test results, so that you could pick the individual animals you wanted.

Mrs. LeBourdais: Even having done all that, would I not be foolhardy not to look at the published figures the ministry gives me on those animals?

Dr. Pettit: Yes, that is what I said, the second step.

Mrs. LeBourdais: It is more than likely that I would not make a decision to purchase unless the value of those indices was high.

Mr. Dombek: It depends what the purpose of your operation would be.

Mrs. LeBourdais: Otherwise, it would suggest to me that although what I am seeing looks like a good animal, the genetic research or the genetic probing is telling me otherwise and I should stay away from it, because looks are deceiving in this case.

Mr. Dombek: What we are saying is that you cannot isolate the test station index by itself.

Mrs. LeBourdais: I am not suggesting that. I am just trying to establish that I would definitely be foolhardy, if not wrong, not to give it substantial weight in my decision.

Mr. Dombek: We have always taken that position. The position we have always taken is that you have to look at all the factors, all the criteria. You cannot overweight one. If you overweight one, you are going to get yourself into trouble.

Mrs. LeBourdais: But if I gave substantial weight to the indices—

Mr. Dombek: Then you are in trouble.

Mrs. LeBourdais: —and just overlooked perhaps the colour of the animal, or if the conformity was not quite what I would like, but the indices were sufficiently high to say that genetically this was supposed to be good breeding stock, would it not be better to go in favour of the indices rather than the lack of conformity?

Mr. Dombek: Then you are leading yourself down the garden path, because you have to take into account the health status and the pedigree and the other items that have been mentioned.

Mrs. LeBourdais: But surely, some factors are more important than others.

Mr. Dombek: Not necessarily; not in this industry.

Dr. Pettit: I think you are confused a little bit with index. All herds are on a bell curve. You can get 150-index animals from any herd in the province. It does not mean they are the same genetically, and that is why we are cautioning people not to buy 150 from everybody.

The effects of the index are designed to bell curve them, so they run between 50 and 150. The superior animals—I am talking, at this point, home test—will be between 100 and 150; inferior from 100 to 50. If you are looking, as a breeder, to improve your animals, you are going to want the animals in the top 50 as opposed to the bottom 50. Or if you are a purchaser who has decided on a breeder and you want to buy his or her best animals, you are going to look at the top 50.

But all the indexes are designed to have that spread. We were talking

earlier about the high index or the best index or anything. You can get a high index from any herd.

Mrs. LeBourdais: But am I not correct that Ms. Morrison said Farm Q did request animals in the top range?

Dr. Pettit: That is a matter of some dispute, which we will get into, hopefully, tomorrow. She may have said that, but as I say, that is a matter of some dispute.

Mr. Farnan: Is the outline you gave of the program contained in the information package we received, and whereabouts?

Mr. Bell: I can help. It is contained, among other places, in the initial position of the ministry, which starts at page 54 and runs through for quite a few pages, at least through—

Mr. Dombek: In volume I, under tab A, there is some background on the ROP program. It may not contain everything Dr. Pettit said, but—

Mr. Farnan: I found it hard to keep up with the explanation as it was given. Is it possible, through Hansard, to have that available tomorrow? I would just like to ask you a question with regard to it.

Madam Chairman: We will make that effort.

Mr. Farnan: In describing the program—maybe you described this in your explanation—are there any checks and balances to the authenticity of the figures produced, and what are they?

Dr. Pettit: I will answer it as it was in 1983. Is that what you are asking me?

Mr. Farnan: Yes, it is.

Dr. Pettit: In 1983, the technicians would develop the results right on the farm, hard copy. They would leave a copy with the breeder and then send the results through the provincial ministry to Agriculture Canada. In 1980 and 1981, the Agriculture Canada computerized program did have edit checks in it to look for the type of things we are talking about here, variances and stuff like that. They were removed in 1982.

The checks and balances that were in place from the data flow in 1983 were essentially that. They were done on the farm; they were checked with the breeder. The technician would send it to the Guelph head office, which would go to Agriculture Canada. If there was any discrepancy, that would go back out to the technician who would talk to the breeder and they would straighten out birth dates or whatever.

Mr. Farnan: Did you say that check was removed in 1982?

Dr. Pettit: In 1981, yes.

Mr. Farnan: So that check no longer existed at this particular time?

Dr. Pettit: No.

Mr. Farnan: Was there any sample testing of individual technicians

on a regular basis that would maintain a provincial standard?

Dr. Pettit: At the time we were running quarterly schools, if you like, for our technicians, the Agriculture Canada technicians and a private company, in which they all monitored the same pigs and were then compared. The difficulty, as we found out later, was that they were all in the same room and they were all being evaluated at the same time. If you want, I can describe the new check now.

Mr. Farnan: I would be very interested to hear about the new check.

Dr. Pettit: In the summer of 1984, we put in the monitoring technician. In other words, presently we have two technicians who visit with the technician, do the results independently, show the farmer and then compare them. That, we found, is a much more successful way than what we had before.

Mr. Farnan: I am familiar with the first kind of testing in a different arena, and that is in education, where a pool of examiners would examine sample answers to a specific question. When this was done in the one room, the results were remarkably close. When it was done independently, the spread was significantly different. Therefore, the types of checks that may have existed earlier, as you appear to agree, were of an inferior quality to what exists presently, which was implemented, say, in 1984. There were no means at the particular time whereby there was testing of the technicians' results in the field?

Dr. Pettit: Not routinely. New technicians were trained. There were sporadic checks, but it was not set up the way it is now where it is once, maybe twice a month.

Mr. Farnan: How many technicians would have existed in the province at the particular time, say, in 1983?

Dr. Pettit: There were seven of ours, two from a commercial company and either two or three with Agriculture Canada, but for our purposes there were seven.

Mr. Farnan: Basically, the quality or the accuracy of their work, there was really no tight framework in which one could say that the standard of testing by technicians would have a guarantee of accuracy.

1610

Dr. Pettit: No, but keep in mind the machinery or the equipment was calibrated to two millimetres, which is fairly large in comparison to what we are talking about. There were no tests, as you say. We were watching the technicians, though, regularly for accuracy. The program has never been advertised as being completely accurate. It is a biological test.

When we have run comparisons, one technician and another, the best we get is about 0.81 agreement. That is if they are testing the same day on the same spots. If they are a day apart, one test that Dr. Kennedy ran for us, they were 0.7 and 0.71. So it is not 100 per cent accurate.

Mr. Dombek: Can I just break in here? I would like to explain that a little bit.

Mr. Farnan: I would prefer if I could continue the line of

questioning, please.

Nobody doubts that this is a very precise measurement. Because it is a very precise measurement and the ministry is issuing these statistics, therefore, one would anticipate that the checks and counterbalances should be equally stringent. Is there not some onus on the ministry if it is actually publishing these statistics—even with the warnings that were coming down at various levels, but very muddled warnings to say the least—given the fact that there are clear directions that these are significant factors? Mrs. LeBourdais, I think, was trying to establish just how significant they are, but I think everybody would agree that these are significant factors in the purchase of a herd.

Given that this is a significant factor, that in the documentation of the ministry, purchasers are certainly directed to consider these indices, and that in the knowledge of the industry it is a very prevalent practice to consider these indices, do you not feel that the ministry was remiss to some extent? I am not saying totally remiss, but to some extent the ministry was remiss in the quality of supervision of those individual technicians who were responsible for producing the statistics which would be considered by purchasers as significant factors.

Mr. Dombek: That is really something that I think if we agreed with, we would not be here today.

Mr. Farnan: May I ask you the question? You do not think then that the ministry has a responsibility to have clearly defined supervisory processes in which their technicians' results will be verified as accurately as possible? Is that what you are saying?

Mr. Dombek: No, I am not saying that. What I am saying is that in this particular case—I think Dr. Pettit alluded to it—the calibration on the particular machines in 1983 was two millimetres which is significantly higher than one would normally expect for these precise figures. In other words, there was a lot of leeway there. It was not as precise and specific as you would have said in the prologue to your question.

The second point that should be pointed out is that notwithstanding my friend's comments on the warnings, I will show to you tomorrow that those warnings are fairly specific. The warnings that were alluded to by my friend that were supposedly inconsistent do not apply to the home test program statistics. They apply to the other statistics. We have to keep those separate.

With the warnings and the fact that the industry knew this program was there, that the calibration was fairly wide, then I think there was not an obligation at that time other than to train the individuals. Specifically, when there were disputes between breeders and the technicians, they were investigated, and if there was a problem, things were corrected.

Mr. Farnan: There is obviously an improvement in the checks and balances of testing in 1988-89 from what existed in 1983. There is a much improved situation with regard to verifying the results of technicians in 1989 from 1983.

Dr. Pettit: Yes.

Mr. Farnan: And the reason that has taken place is because of perhaps this experience and other experiences, that the ministry has

recognized that there was indeed a weakness in the system.

Dr. Pettit: Yes. There were two or three reasons we considered it. In 1983, there was a long-term study by the provincial advisory committee which suggested we should look in this area. During the summer of 1984, before this complaint came up, we had investigated the problem and had realized that there were some difficulties, and that is why we were starting to put some of these things in place.

Mr. Farnan: In fact, then, this particular case actually confirmed your worst suspicions that there were weaknesses within the system that needed to be addressed by having additional checks and balances.

Mr. Dombek: I am not too sure they were our worst suspicions.

Mr. Farnan: Obviously, if there was a study and you were looking at ways to improve the system—

Mr. Dombek: We were always suspicious of the statistics. That is why we warned people in our brochures and all the periodicals that are mentioned and were pointed out.

Mr. Farnan: I would like to go back to your point, because you were not saying to people in your warning, "Don't take heed of these statistics, because the testing of our technicians is faulty." You were certainly not putting that in your warnings.

Mr. Dombek: No, but we were telling people to be careful in the way they used them. What we will see tomorrow, when we have Dr. Kennedy, is that the way these statistics were used—we are getting into the specifics and I really do not want to do that—was not in conformity with the warning. To some extent, the complainant in this case—again, I am getting into argument, which I should not be—either ignored the statistics or misused them, plain and simple.

Mr. Farnan: I do not want to get into argument, either. I want to keep to the point that obviously the credibility of the ministry and the professionalism of people like the doctor you brought in to support your position and all of the people who are involved in testing demands the highest level of testing. Because they are professionals, they would want that. What we are seeing here, I think the crux of the matter, is that the ministry is saying that the testing system was deficient in 1983. I think that is very relevant to the case.

Madam Chairman: I have Mr. Charlton, Mr. Carrothers and Mrs. LeBourdais. At the request of our presenters, we are trying to adjourn at 4:30 p.m. Three minutes each, perhaps, and we will continue tomorrow.

Mr. Charlton: You described for us the testing procedures, both the station testing and the home testing and what generally those are supposed to represent and be used for. A purchaser is out looking for pigs to purchase. The place he is supposed to start is the station testing results in terms of trying to identify the category of pigs that he or she is seeking; looking at all of the criteria he is interested in as a farmer.

1620

Dr. Pettit: Yes. Maybe I do not have time tonight, but I was

planning to draw on the board the bell curve and describe exactly why it is different for the station test than for the home test. Very quickly, when we have 1,500 animals going through the station test, that represents the 200 or so breeders or most of the larger ones anyway. Therefore, if you are looking at those results, you can pick out where the better breeders are with regard to the area you are interested in. If it is back fat or gain or breed, whatever, that is where you are going to go. Once you get that, then you are going to look at the results from one or two breeders whom you are going to buy from, because that is what happens: you buy from a breeder. If that breeder then has published all of his information, which we do, then you have something to look at and compare.

Mr. Charlton: Yes, but once we have chosen the breeder or breeders from whom we are going to purchase, then we forget about the station testing results—

Dr. Pettit: That is right.

Mr. Charlton: —and we look at the other criteria: the health criteria and the home testing criteria.

Dr. Pettit: That is right.

Mr. Charlton: We have taken the station testing criteria and we have set them aside now because we have chosen our breeder. We are looking at the home testing criteria. Now I have a couple of questions, first of all, about the indices that we come up with, because those indices are based on thickness of fat and rate of growth.

Dr. Pettit: Fifty per cent each.

Mr. Charlton: Fifty per cent each. Theoretically, you can have two pigs. One is fatter than the other by 0.3 millimetres, but the fatter one happens to have a faster growth rate. The index will be the same for those two pigs.

Dr. Pettit: It could, yes.

Mr. Charlton: Am I correct?

Dr. Pettit: Yes.

Mr. Charlton: Mr. Carrothers asked a question earlier, when we were still dealing with the Ombudsman's staff, about whether, if you were measuring the fat thickness consistently wrong but consistently relative, it could screw up the ranking. Yes, it can, because of the combination with growth rate. In other words, even if you were measuring incorrectly but measuring incorrectly consistently, it can still screw up the ranking because of the combination of those fat thicknesses with the growth rate.

Dr. Pettit: I think I understand your question and I think I agree with it.

Mr. Charlton: Okay.

Dr. Pettit: Tomorrow it will come out clearer.

Mr. Charlton: I just want to move fairly quickly to the question of

ranking by indices for the purpose of actually pairing the breed. Presumably we are doing that because science has shown us, in more complex terms than those in which I am going to express it right now, that if you mate a low-fat fast-grower with a low-fat fast-grower, you are more likely to get a low-fat fast-grower offspring than if you mate a high-fat slow-grower with a low-fat fast-grower.

Dr. Pettit: Yes, we understand.

Mr. Charlton: You have a chance of getting one or the other or something in the middle. All right. I would assume that those are the kinds of things that science has shown us and that is why we are using the indices to decide where the breeding occurs and with what.

Dr. Pettit: It is not 100 per cent, though.

Mr. Charlton: All right. I suppose tomorrow you are going to tell us about why you think the errors were insignificant in the context of purchase, perhaps. What I want to get at is the doctor's comments on the question of breeding. You may get the best stock, or range of stock, that is available. If you do not mix and match them appropriately, do you end up with a failure?

Dr. Pettit: Breeders will want to improve in one aspect or the other, back fat or growth, as you have mentioned, and therefore you would be selecting pigs that would help improve that particular aspect of your operation, whether you are doing it in your own herd or whether you were going out to buy some.

Mr. Charlton: If the home statistics indices on the pigs that a purchaser purchased were incorrect, and I think, as has been indicated in ministry documents, those incorrect indices not only were incorrect as a package of statistics but they created distortions in the ranking—

Dr. Pettit: Somewhat.

Mr. Dombek: Not a significant amount of distortion, but there was a little bit of distortion, granted.

Mr. Charlton: I suppose again you are going to show us statistically how you feel it was insignificant, but if the ranking is wrong, does that not inhibit a breeder's ability to achieve his or her goal, in terms of matching the appropriate males and females to produce the product he is looking for?

Dr. Pettit: If they were completely wrong, that would play a part, yes.

Mr. Charlton: To what extent does the ranking by index have any relevance to breeding? To what extent is it important in the choice of who you breed and how you breed them with whom?

Dr. Pettit: As I said earlier, it is not 100 per cent, it is roughly 50 for growth rate, but it is a guide.

Mr. Charlton: I think fat content and growth rate are both important to the farmer, though.

Dr. Pettit: That is right. So they will look at those results and attempt to improve themselves in the area where they need it. I am not sure that I am giving you the answer you are looking for.

Mr. Charlton: You may have a situation where one farmer is more concerned about growth rate, because he has already got his fat content down where he wants it, while another farmer is more concerned about getting the fat down and less concerned about the growth rate. Now you have two farmers looking for two different things out of a ranking system that takes both into account. To what extent is that combined ranking system going to screw up the one goal or the other goal if it has misrepresented the way those animals should be matched for the purposes of breeding?

Mr. Dombek: Perhaps I could just ask you to clarify. Are you suggesting ~~needs may be~~ are, Mr. Charlton, that there should be separate

Mr. Charlton: No. I am not suggesting. I am asking you---

Mr. Dombek: You are asking why there is not?

Mr. Charlton: No. I am not asking why there is not either. What I am asking is---

Mr. Dombek: Are you asking why they are combined?

Mr. Charlton: You have told us---and it was referred to a couple of times this morning. I cannot quote it off the top of my head. We can go back and get Hansard and refer to the specific quotes we heard this morning, but there are documents that are before us that suggest that the errors in the particular case before us, in the home statistics, could cause problems with the ranking as well. What I am asking is, how important is the ranking, the index, to successful breeding?

Dr. Pettit: That leads into a lot of the studies that we will be talking about tomorrow. If you were selecting the top animal or top animals, if that is what you were selecting, and I am not talking per se about this case, but if you had a misranking or mismeasurement, then the guide that you were using would mislead you.

Mr. Charlton: Okay. Let me be a little more specific, without getting into the specific case, just so I can get some sense, because I still do not have a good sense of how a breeder is supposed to read those home statistics.

You talked about 50 to 150, and if you are talking about breeding, you are looking at 100 and better; 100 to 150 are the indices you are going to look at. I am going out and I am purchasing everything this breeder has from 130 to 150, but then I have to figure out how to mix and match that 130 to 150. What happens if, because the indices are screwed up, I am matching 130s with 150s?

1630

Dr. Pettit: I guess I did not make it clear earlier. It is not just indices they get; they do get the measurements as well. Two pigs could be 130, as an example. One could be much better for back fat; one could be much better for growth. You can see the specific results that would lead you to the best pig.

Mr. Charlton: I understand that, and I understand that if my priority as a breeder is growth rate and not back fat, or vice versa, I am

going to go for the one in the test results that suits my purpose. I always presume that if there are two factors put together to make one, I know what the two factors are and I know what the result is which ranks them. But I have 130 to 150. I know what my priority is. I am buying the pigs because of the growth rate; I already have my fat situation under control, so I am looking for growth. That is what I have looked for in the makeup of the statistics, but the statistics themselves create the ranking.

I have bought the pigs between 130 and 150. I have bought the best out of this breeder; I have bought his top package. But because the statistics are screwed up, I am mating 130s and 150s. What does that do to the goal I have set out for myself and the expectation I have because I thought I was matching 150s and 148s?

Mr. Dombek: If the ranking was totally wrong, as Dr. Pettit indicated, then you would be in trouble. But the rankings—again, we will show tomorrow—were not totally wrong.

Mr. Charlton: I guess what I am trying to get out of you, and maybe you can provide this to us tomorrow, is some indication other than statistics, some science, of the importance of the genetic factors that are reflected in the index, in terms of breeding success.

Mr. Dombek: We can do that. What did you want, verbal or some scientific papers?

Mr. Charlton: I do not much care, because Hansard will be there if it is verbal. As long as you can give me some concrete idea of what we are talking about when we talk about using ranking to mix and match and what it means to the success of the project.

Mr. Carrothers: I have one very quick question. Did I understand you to say that the error factor in this ultrasonic testing is two millimetres?

Dr. Pettit: No. At the time, the equipment was calibrated to two millimetres. It is now one millimetre.

Mr. Carrothers: What would that mean, calibrated to two millimetres? Does that mean if it gave a reading it would be plus or minus two millimetres? It could be a range of four millimetres?

Dr. Pettit: It will be one millimetre each side of that, so it is a range of two millimetres.

Mr. Carrothers: What is the average fat layer on one of these pigs?

Dr. Pettit: Oh, 12 millimetres. Not average; that is excellent. That is a good pig. The average is more than that.

Mr. Carrothers: What I am trying to get at is that if you are doing a reading with a two-millimetre error factor, what are you getting? About a 10 per cent error? If the machine says you have a 10-millimetre layer of fat, it could be anywhere from nine to 11; is that right?

Dr. Pettit: That is right. That is a little better now, because our equipment is a little more exact.

Mrs. LeBourdais: We are often told in politics that it is the perception, not the reality. I am having some problems with the perception on this.

Apparently I am seeing, or being told about, a system that cannot be relied on 100 per cent of the time and perhaps not even as much as 50 per cent of the time; a system that supposedly has been misread not only by farmer Q, who you yourself have said is a sophisticated hog breeder, but misread by other farmers who have chosen perhaps not to go this whole route and end up here today; a system that has been measured with equipment that was, at best, faulty, by someone who could not read the machine or read the system well. Am I all wrong in my perception?

Mr. Dombek: I think you are, because you have only heard one side of the situation. We have never said—if this has been repeated once, it has been repeated a hundred times—that these statistics were correct, that these figures were correct. Obviously, we took measures to correct the situation when this came to our attention.

I guess my problem with this is that, as equipment becomes more sophisticated and calibrations become better—years ago we would not have been able to measure Alar in apples, and now we can, down to very small amounts—

Mrs. LeBourdais: But I am just wondering how the farmer should be blamed for this. I grant you that technology has advanced—

Mr. Dombek: I have not blamed the farmer for this. What I am saying is that this particular farmer either misused the statistics—if he relied on the ROP home test statistics completely, he did not follow the program.

Mrs. LeBourdais: But they were not right to start with, which you have agreed with.

Mr. Dombek: That is right.

Mrs. LeBourdais: Even if he based 40 per cent of his total assessment on those, he is 40 per cent wrong to start.

Mr. Dombek: No. You will find that it is completely different from that; the correlation and the amount of error involved in these measurements was so minimal that it had no effect at all on this particular breeder. When you have a ranking of 200 hogs and you pick number 8, number 72 and number 162, and you choose a low index of 85 and that is stated in your contract, then you are looking for trouble. That is reality.

Mrs. LeBourdais: Hopefully by tomorrow, when you state your position, you can clarify for me some of my misperceptions which you feel I have at this point. Thank you.

Madam Chairman: The committee will adjourn now until tomorrow morning at 10 o'clock, at which time the ministry will go into its case in more depth.

The committee adjourned at 4:40 p.m.

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STANDING COMMITTEE ON THE OMBUDSMAN

CASE OF FARM Q

WEDNESDAY, MARCH 29, 1989

Morning Sitting



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Bossy, Maurice L. (Chatham-Kent L)
Carrothers, Douglas A. (Oakville South L)
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LeBourdais, Linda (Etobicoke West L)
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Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitutions:

Cureatz, Sam L. (Durham East PC) for Mr. Pollock
Farnan, Michael (Cambridge NDP) for Mr. Philip
Johnson, Jack (Wellington PC) for Mr. Cousens

Clerk: Carrozza, Franco

Staff:

Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon
Wilson, Jennifer, Research Officer, Legislative Research Service

Witnesses:

From the Ministry of Agriculture and Food:
Dombek, Carl F., Director, Legal Services
Pettit, Dr. James, Director, Animal Industry Branch

From the Office of the Ombudsman:
Morrison, Gail, Director, Investigations

Individual Presentation:

Kennedy, Dr. Brian, Professor, Department of Animal and Poultry Science,
University of Guelph

STANDING COMMITTEE ON THE OMBUDSMAN

Wednesday, March 29, 1989

The committee met at 10:16 a.m. in committee room 2.

CASE OF FARM Q LTD.
(continued)

Madam Chairman: If we can call the meeting to order, I have been informed by the clerk that Mr. Farnan's request to get Hansards from yesterday afternoon respecting the record-of-performance program will be available later this morning. They are just being processed and they will be photocopied for all of us. I know you are all waiting with bated breath for this information.

Mr. Dombek: In that regard, I do have some photocopies of the first 20 pages of the ROP Swine Breeders Handbook. I have the original here, which includes the last few pages. Basically, the first 20 pages deal with what Dr. Pettit talked about yesterday. The last part, which I did not bother photocopying, dealt with things such as tagging an animal's ear, notching it, identification of purebred swine and so on, items that really are not germane to this particular inquiry. I will give Mr. Farnan and the other members a copy.

Madam Chairman: Would one of the originals be available for the record?

Mr. Dombek: Sure.

Madam Chairman: Is there anything the committee needs brought up before we commence today? There being none, the Ministry of Agriculture and Food was in the process of making its presentation. Please go ahead.

Mr. Dombek: One of the questions that was asked yesterday, which I think we can clear up right at the beginning, dealt with the chronology of events that led up to this problem. The information that was provided by the Ministry of Agriculture and Food, as you are aware, starts from August 27, 1984. That was after we first learned of the difficulties.

However, the information we have is that farm 1, which was the vendor of the pigs, had its pigs probed by the OMAF technician between January 9, 1984, and June 18, 1984. A check of the probe commenced on July 3, 1984. That is when a new technician went to farm 1, and his readings were different. On July 4, the very next day, a second technician went out and checked the readings. On July 5, the original technician was called back from vacation and the other two technicians, the one from July 3 and the one from July 4, all attended farm 1 and did the readings.

These were 71 new pigs and they were not the pigs that were shipped to the complainant. Of interest—I think this is an important date also—farm 1 started its delivery of pigs to the complainant on July 4 and it was completed on July 5. Those events more than suggest that delivery took place before the probing errors were determined. The pigs shipped were not double-probed. Once again, the pigs that were probed were not the pigs that were shipped to the complainant.

Mr. Bell: I am sorry, on those dates, we touched upon it yesterday and I think, doing the chronology this way, it is important to have as much relevant information surrounding dates as is possible. As I understand the chronology, it goes from July 3, 4 and 5, then there is an event on July 31 in Guelph and then there is an August delivery of a new machine to the original technician. Are you able to confirm that as far as the ROP indices were concerned, the original indices remained for a period of time?

Mr. Dombek: That is right.

Mr. Bell: Can you help us as to what the reason is that the original readings remained and how long they remained?

Mr. Dombek: Dr. Pettit can assist here. However, it is the policy and practice of the national advisory board—when I talk about the national advisory board, this program is a federal-provincial program. It is one that is applicable to all the provinces. The members of the national advisory board include two representatives from each province—that is, one government official and one breeder—three representatives from Agriculture Canada, a representative from the artificial insemination industry, a representative from the meat packers' industry, two representatives from the breed society and one technical representative. The technical representative on the national advisory board is Dr. Kennedy, who is sitting on my left today. I will introduce him in more detail later on.

The policy of that national program is that when there is a discrepancy, the original readings stand until confirmed to be inaccurate. That is not a Ministry of Agriculture and Food policy; that is the policy that is applicable from British Columbia to Prince Edward Island or Newfoundland.

Mr. Bell: Are you able to give us some dates, then, with reference to the particular events in July and August 1984? How long did it take to confirm the inaccuracy and then what steps were taken?

Mr. Dombek: I can tell you that the original technician had been fully retrained and re-equipped with new equipment and was fully operational by August 23, 1984. So, some time after the period of July 5 to August, there was that retraining going on.

Mr. Bell: May we then conclude that some time shortly after that the communication was made?

Mr. Dombek: On August 27, 1984, which is the first document in the ministry's volume of material, volume I, that is the result of it. The ministry received a call from Farm Q.

Mr. Bell: No, that is not what I am asking.

Mr. Dombek: Sorry, I interrupted you before you finished your question.

Mr. Bell: Yes. What I am asking is, when did the ministry or the program advise those concerned that the original readings were inaccurate and were to be replaced by new readings?

Mr. Dombek: Perhaps you can explain. Do you mean advised the breeders?

Mr. Bell: Whoever was advised.

Mr. Dombek: Or the national advisory board?

Mr. Bell: For farm 1 in July, right through August presumably, the original McKee readings for those pigs tested remained, correct?

Dr. Pettit: Yes.

Mr. Bell: That means anybody making inquiries about those pigs, as for the indices, would be informed of those readings?

Dr. Pettit: Yes.

Mr. Bell: Some time within that interval, the inaccuracies were confirmed, to use Mr. Dombek's language, and we are going to see what the cause of that was later this morning. At some time after August 23, to select a date, a decision was made to change the indices?

Dr. Pettit: Yes.

Mr. Bell: When was that decision made and how was that decision communicated and to whom?

Dr. Pettit: The staff study that occurred during the summer, which you alluded to, suggested that there was not a significant compromise in the program. The supervisor of the program, however, felt there was enough concern with the figures that the new readings would be applied, for the sake of a date, after August 23. He began to visit all the involved producers during the next period of time and informed them of the problem and what was going to occur.

The ministry's consultant, who looked at the probing error, severely criticized us later in the fall for making that step and he suggested that since the errors did not compromise the results, we should have left them the way they were. As of January 11, there is a letter in there in which I announced to the industry that we would go back to the rolling base and incorporate the figures that way. Does that clarify?

Mr. Bell: With respect to the particular pigs on farm 1 that were probed in July with the three sets of results—

Dr. Pettit: Those results were the investigation of the ministry sir; they were not official results.

Mr. Bell: All right. You have told me that the indices as determined by McKee—we can call them the formal indices for those pigs—were, subsequent to August 27, changed.

Dr. Pettit: No, not the original July information. From August 23 on, we said that we would just use new information in the information we were providing on those 20—some producers. What, in effect, we were criticized for by our first consultant—and that is in there—was that we should not have done that. The information did not compromise the program. We should have kept the same approach and just rolled them right in, and that is what we eventually did back in January, or ahead in January 1985.

Mr. Bell: When the two additional technicians in July probed those

pigs, in the language of your documents, they got substantially different results than McKee did.

Dr. Pettit: That is right.

Mr. Bell: When you finally got it sorted out and everybody was using the same machine eventually, a new machine, you ended up with substantially the same results.

Dr. Pettit: That is right.

Mr. Bell: So the substantial difference was eliminated.

Dr. Pettit: Yes.

Mr. Bell: Did you do anything to the indices ultimately which took into account the elimination of that substantial difference?

Dr. Pettit: I think later in the discussion of the ministry's position it will become apparent that the results, although inaccurate, were consistently inaccurate. Therefore, there was not a significant compromise in the ranking of the pigs. Okay?

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Mr. Bell: No, no, I want an answer to my question. Did you do anything to the indices that reflected the elimination of the substantial difference as determined in July 1984?

Mr. Dombek: I think Dr. Pettit has indicated, Mr. Bell, that there was not a substantial difference, that the first consultant hired by the ministry to look at the program said there was not a difference that was significant in relation to the original probes taken by McKee and the changes that were noted by the testing, if you want to call it that, done on July 3 and 4.

Mr. Bell: So the answer to the question is no, you did not do anything to the indices to reflect the elimination of what your documents call a substantial difference?

Mr. Dombek: We took some action. The action that was taken was that the ministry—correct me if I am wrong, Dr. Pettit—stopped the probes from July 5 to August 27.

Dr. Pettit: No, we started a new base, so we started using the information we were collecting as a new base for the affected breeders. That, in turn, was found by the consultant to be wrong. They said we should not have done that and that is why we went back to the original system.

These figures, as they are input into the program, are on a rolling average, which plays a very important part later on in our discussion, which means they are annual composite figures.

Mr. Bell: Will you turn to tab 1 of your volume I? I appreciate we will get to your expert later, but I think it is important for the committee to understand what is the background of what he is saying.

That is a letter that was written, probably at the first opportunity, by

the supervisor of the program to McKee, probably, at least as far as this documentation is concerned, first recording the problem. Are we agreed?

The second paragraph indicates the difference between what McKee got and what the rest of the technicians got.

Dr. Pettit: Right.

Mr. Bell: McKee got a variation averaging only 0.92, millimetres, presumably, and the rest of the technicians got a variation averaging 2.06.

Dr. Pettit: Right.

Mr. Bell: I want to understand, is your expert saying that after he did whatever he did, he concluded that was not a substantial variation which required a changed in the indices?

Dr. Pettit: Can I let him tell you?

Mr. Bell: Certainly.

Mr. Dombek: This is getting a little bit out of order, but perhaps I can take a moment before we get into that question.

I would like to introduce Dr. Brian Kennedy. Dr. Kennedy is not an employee of the Ministry of Agriculture and Food. As he is somewhat modest, I think I will just give you a little bit of background about Dr. Kennedy.

He received his bachelor of science in agriculture in general agricultural science from McGill University in 1965. He got a master of science degree in animal genetics from McGill University in 1970. He has a PhD in animal breeding, which he received from Cornell University in 1974. From 1967 to 1969 he worked as a graduate research assistant at Macdonald College of McGill University. From 1969 to 1972 he was a graduate research assistant at Cornell.

From 1972 to 1977 he was an assistant professor at the department of animal science at Macdonald College of McGill University and the director of research for dairy herd analysis service. From 1977 to 1979 he was associate professor, department of animal science at Macdonald College, and director of research, dairy herd analysis service. From 1979 to 1981 he was an associate professor at the department of animal science at the University of California at Davis. From 1981 to 1984 he was associate professor at the department of animal and poultry science at the University of Guelph. From 1984 to this date he is a professor, department of animal and poultry science, University of Guelph.

In addition, this voluminous curriculum vitae is chock full of a lot of learned articles in scientific journals and reviews and things like that which Dr. Kennedy has done, in addition to speaking to the industry and so on.

Dr. Kennedy: The introduction has been so long, I almost forget the question.

Mr. Bell: Sir, it would help if you had the ministry's tab 1 of its volume I before you.

Dr. Kennedy: Yes. It is in front of me. Just to try to clarify

things, the pigs in question that were shipped from farm 1 to Farm Q were all probed by the one technician, McKee.

Mr. Bell: Yes. We understand that the pigs we are talking about this morning are not the Farm Q pigs.

Dr. Kennedy: That is right. Then there was a sample of 71 pigs that were probed by both McKee and Lambert, who was the supervisor, and those were the data we used to establish the margin of difference between McKee's probes and Lambert's probes, which we assumed were more correct.

Mr. Bell: Are you telling us then that the data in the second paragraph of this letter in tab 1 was ultimately determined not to be accurate?

Dr. Kennedy: What I will say is the indexes that went with the 71 pigs were the indexes probed by the third technician, who went in to the herd as the replacement technician. The only possibility would be then to say, "Well, do we correct historical data, go back and correct the data that McKee generated where he believed he was probing low?" We could do that by making a systemic correction for that error. In other words, we estimated the difference was 2.4 millimetres, and we could have gone back and corrected the historical data. For some purposes in genetic evaluation, that was done, but I believe, for computing indices, where historical data are used, no change was made. I do not know whether I have clarified things or muddled them.

Mr. Bell: Again, just for the record, those figures in that second paragraph represent what the ministry computed or determined to be the variations in readings between McKee and the rest between April 1, 1983, and March 31, 1984, a fiscal year. Correct?

Dr. Kennedy: Yes.

Mr. Bell: Okay. What you are telling us is that no steps were taken to correct or to make adjustments vis-à-vis the indices produced by McKee's readings for that year.

Mr. Dombek: No. I think Dr. Pettit indicated that what happened was this. When the probing error was discovered, the ministry then stopped using those statistics for those indices and it started a new base. Okay? They started from square one. That was the corrective action that was taken. This corrective action was later criticized by Dr. Fredeen.

Mr. Bell: I thought it was criticized by this gentlemen.

Mr. Dombek: No, it was criticized by Dr. Fredeen, who evaluated the entire program subsequent to the event and said that the ministry acted too quickly; that what was there—what the McKee readings were—was not substantial enough to affect the rolling average of the farm 1 pigs.

Mr. Bell: All right. That gets me to my first question. Do you agree with Fredeen's conclusion that the differential as determined in this page is not substantial enough to require a change?

Dr. Kennedy: The correction I made in our data was for the systematic error. Perhaps I should explain the two types of errors. There is one error that is analogous to getting on a scale and the scale will consistently weigh you five pounds over or five pounds under.

Mr. Bell: I have one at home.

Dr. Kennedy: So you make the adjustments. We all probably tend to adjust down when we do it on our own bathroom scales. That is one type of error.

This one in here is talking about the variation among measurements. You take a series of 20 or 30 measurements and you say: "Okay, how variable? What is the measure of the average differences between individuals?" McKee was getting much less variability than other technicians were. McKee's is the 0.92 figure, and the other technicians' were the 2.0 figure.

For computing indices, my understanding was that initially the 2.0 would have been used, up until the time Fredeen's report came in, and then they went back to pooling the data, which would have involved a mix of the two figures. The average probably would have been around 1.5.

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Mr. Bell: So then is Fredeen not arguing statistically when he says that you should not have changed the whole program because of what one seventh of your staff did? Is that really what he is arguing?

Dr. Kennedy: No, I think the only changes that were made were in those affected herds.

Mr. Bell: And he criticized that.

Dr. Kennedy: I believe he did.

Mr. Dombek: That is right, yes.

Mr. Bell: Do you agree that the ministry acted, in Fredeen's words, too quickly in changing its method of reporting?

Dr. Kennedy: I guess what I am saying is that I did not spend a lot of time thinking about it because the question is irrelevant to the problem of the probing errors in the Bodmin herd. Whether one historically, after the fact that the pigs were selected, then makes a change and changes the indices, to me is an irrelevant investigation. It has no effect on what did or did not happen in the selection of those pigs in farm 1 that ultimately went to Farm Q.

Mr. Bell: I think I have confused everybody. We should wait for the appropriate time to hear you on that unless the committee wants to hear you now.

Mr. Dombek: I would rather we did this at the appropriate time.

Mr. Bell: Just before you get into that, let's take an inventory of what the ministry did, as reflected by the documentation. They undertook this study in the summer of 1984, as we have heard about. I take it the study was precipitated by the inconsistencies as determined in the farm 1 readings in early July. I am not aware of any other event that caused the study to be undertaken. If there is, please volunteer it to us.

The ministry, when it determined that McKee, for whatever reason, was getting consistently lower readings, took some steps. It stopped sending data to Agriculture Canada, it stopped publishing the biweekly reports with that

data and it undertook a number of changes to its program, as recommended by certain reports, as we will see in here.

I want to know and I think the committee wants to know, now with hindsight, were all of those steps taken unnecessary?

Mr. Dombek: Perhaps Dr. Pettit could answer that.

Mr. Bell: Just let me lead you to where I am going. If the ministry's position is that these errors and differences and discrepancies are irrelevant, then why bother changing anything?

Dr. Pettit: That was eventually our conclusion after January. We were doing a lot of study on 20-some breeders at the time and trying to get to the bottom of the situation—what had happened and what significance it had to the program and to the individuals. Then the current case came along as well, but that was what we were looking at at the time.

The staff study that occurred and the supervisor of the day recommended that we start, as I said, at a new base. We did that. We brought in the first consultant to look at the whole program. As I said, there were a lot of other issues at the time. During the study in his reports there, he came out with a number of recommendations, one of which severely criticized us for doing what we had done, saying that in effect we should not have done it. We reversed our decision later in the fall or in January and went back the other way.

Mr. Bell: What he criticized you for doing was, as I understand it, changing the indices at all.

Mr. Dombek: Wait a minute. You added something at the end there.

Mr. Bell: Changing the indices.

Dr. Pettit: Yes, that would affect the information.

Mr. Bell: Then if that criticism has merit, then you ought not to have cut off the data to Agriculture Canada; is that right?

Dr. Pettit: That is right.

Mr. Bell: And you ought not to have terminated the publication of these indices in the biweekly reports; is that correct?

Dr. Pettit: Yes. In hindsight, that is right.

Mr. Bell: In hindsight?

Dr. Pettit: Sure.

Mr. Bell: And you ought not to have undertaken any changes to your program as recommended by, I think, the Urquhart memo?

Mr. Dombek: No, I do not think so. I think you have confused something there. Dr. Urquhart did not recommend any changes.

Mr. Bell: He listed about seven or eight items.

Mr. Dombek: You are thinking of Dr. Fredeen.

Mr. Bell: No, I am not. I am thinking of your tab 6, the memorandum from Dr. Urquhart to Dr. Pettit, "Quality Control in the Swine ROP Program."

Mr. Dombek: Okay, that is fine.

Dr. Pettit: Oh yes, okay.

Mr. Dombek: Sorry, you did not refer to the document.

Mr. Bell: Sorry. I think Dr. Pettit and I were talking about the same thing.

What you are telling us now, in light of your expert's finding criticizing the initial step vis-à-vis these indices, is all of these steps you took were unnecessary?

Dr. Pettit: No, that is not quite the case. That was with regard to the information and how we handled it. Of course, these programs—I alluded to it yesterday somewhat—are evolving. This one has had 20 years. The dairy program has had 70 or so. As we go through these exercises, we find areas where we can improve, both from staff and from outside help. These were recommendations to me by my program manager at the time on ways that we can ensure that we did not have these problems in the future.

Mr. Bell: Okay. This started when I interrupted Mr. Dombek to fill in the chronology around the July-August 1984 period. Mr. Dombek, I think in fairness I should leave it back to you to determine how you want to proceed hereafter, whether you want to—

Mr. Dombek: Fine. I want to continue on. I have already had the opportunity of introducing Dr. Kennedy. What I would like to do is refer you to the synopsis that was prepared by the staff of the Ombudsman and the ministry. I believe that is found at page 4 of the material that was supplied to you in the black binder by the Ombudsman.

Mr. Bell: That is tab 2, members, of the black binder.

Mr. Dombek: Perhaps I can refer you to page 4 of that analysis or of that synopsis, under the heading "Ombudsman's Analysis of the Issues," page 4 of the document. What I plan to do is to go through those headings, those numbered paragraphs and to supply the ministry's answer to them and where appropriate, where Dr. Kennedy can further explain some technical information that we have, we will have him do that at that time.

The first one, of course, is entitled "The Complainant has to buy from farm 1." That is the ministry's statement. At this point, there is no evidence before this committee to prove this contention except the complainant's own statement that he would not have had to buy pigs from farm 1.

During discussions with the ministry prior to the laying of the complaint, the complainant never mentioned that he would not have bought any pigs. In fact, his intention was otherwise. There is documented evidence that the complainant had earlier intended to expand his herd. In that regard, I refer you to volume V of the ministry's document. It is the buff-coloured document, tab 132. Now, if you go into that tab about 10 pages, you will find a letter dated March 15, 1983.

Madam Chairman: The one to Dr. Brian Kennedy?

Mr. Dombek: That is right. This is a letter from the complainant, and I would like to read portions of it into the record.

"Dear Brian,

"We are considering establishing a 320-sow farrow-to-finish nucleus breeding unit in western Ontario. I must emphasize that this is still in the earliest stage but should it come it pass we shall have the advantage of being much closer to Guelph than we are at present."

I believe what he meant there was being closer to the University of Guelph rather than physically closer.

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"Marketing considerations require that we join the ranks of the pedigree fraternity—greatly to my regret—but pieces of paper with large red stamps on them seem to have a metaphysical value of considerable significance. Another consideration is that we start with the highest health status attainable that is commercially realistic.

"These thoughts prompt me to write to you to inquire about the availability of your stock. Are you prepared to sell us pedigreed stock and in what numbers?

"In setting up a unit of this size it would be ideal if one could introduce gilts at a rate of approximately 20 per week. Assuming that these are highly selected animals, they could constitute the production of a large unit for from four to six months. Are you in a position to accept orders on this sort of scale and would you allocate the necessary priority?

"This is in the nature of a preliminary inquiry. Assuming your response is affirmative, we could discuss details of selection criteria and standards and doubtless a host of other things that are bound to crop up.

"I greatly enjoyed my visit to Guelph the other day and look forward to further discussions with you on pig breeding and wider issues.

"Yours sincerely."

In this letter dated March 15, the complainant raised the possibility that he might be willing to buy pigs from the University of Guelph. Granted, the complainant talks about this purchase as being at an early stage and a preliminary inquiry. But it shows his mind was considering an expansion, not that he was so misled by the record of performance home statistics that he would almost be forced to buy pigs from farm 1.

Obviously, details had to be worked out, but I suggest to you that the complainant was actively soliciting at least one breeder, the University of Guelph, to determine whether a purchase was a possibility.

However, this letter is more important for two other matters, and I must emphasize this. One is about the information that it contains, and the other is about the information that it does not contain. I will briefly mention them here and I will discuss them again later.

First, the complainant establishes the two most important criteria he used for wanting to buy stock: (a) pedigree and (b) high health status.

Mr. Bell: Where does he say they are the two most important?

Mr. Dombek: I am suggesting to you that is what you can take out of the letter because there is nothing else mentioned.

Mr. Bell: I just want to make sure that is your submission that is what this letter stands for, not that he has said anywhere that these are the most important criteria.

Mr. Dombek: That is what I say.

Mr. Bell: I do not think so.

Mr. Dombek: Well, okay.

The second important thing is the information that he did not say. There is no mention in this letter at all regarding back-fat levels or fast growing rates, none whatsoever. You might say that perhaps the complainant changed his mind, and perhaps he did. But we do not know, because we do not have any evidence that his criteria changed. This is the only document that we have or that the Ombudsman has that gives us any idea as to what was going through his mind at least in March 1983.

Later on, in fact, you will see the actual buying practices of the complainant would further suggest that back fat was not a high standard when he did purchase his pigs. I should also point out to you that the ROP home statistics on the University of Guelph pigs were available and known to the public. It was publicly and widely known that the University of Guelph pigs were known to be fatter hogs. But more on that later.

Second, I should also point out that the buying practices of Farm Q also indicate that it purchased 55 pigs from a second farm, which had both pedigree and high health status but were fatter pigs at the time of their purchase.

Again, his letter gives us a preliminary indication. I grant you it is not the strongest indication, but it is there. When you couple it with what he actually did and what he actually purchased, then I think you can see that he did not change his mind. Again, I shall get back to that later, particularly about the purchase of the 55 pigs from farm 2.

Madam Chairman: Mr. Bell has a question.

Mr. Bell: While we are on the letter, do you know from Dr. Kennedy whether during the visit to Guelph, and presumably it was a visit with Dr. Kennedy, the question of the indices was raised and discussed in relation to—

Mr. Dombek: Mr. Bell, I wonder if you could hold the questions. What are we doing? I was under the assumption yesterday that both parties were going to be given an opportunity to go through their presentations.

Mr. Bell: That is fair. We will hold that question then.

Mr. Dombek: Thank you. It just throws me off a little bit.

I would like to move on to the second point, the fact that the ministry has said the complainant did not have to buy his pigs in Ontario. Again, this statement is really not true. He did have to buy Ontario pigs. He actually had no choice in the matter. Remember, he has established or we feel he has

established two main criteria, pedigree and high health status, particularly when you look at his buying practices.

To achieve a rating called "excellent health status" under the Ontario swine herd health policy, which was described by Dr. Pettit yesterday, the complainant had to buy Ontario pigs. Otherwise, his herd would have received a lower health status. Why is this important?

This lower health status would not have met one of the two criteria we feel the complainant had established. This is important because the pigs with the lower health status would not be as desirable for breeding sales. It is a very important fact that with a good health status or less, he would not have been able to have good breeding sales.

In actual fact, the complainant bought pigs from farm 2. Let us discount the pigs from farm 1 for a second. The farm 1 pigs are supposedly the ones that misled the complainant. Let's discount them. If we look at the statistics for back fat at the farm 2 pigs from the ROP home studies, they were considerably higher at the time of the purchase. At this time, I could ask Dr. Kennedy for a comment on that point.

Dr. Kennedy: The comment is correct. In the university herd, the pigs were fatter than the provincial average by a considerable degree, particularly at the time inquiries were being made about the purchase, in 1983-1984.

Mr. Dombek: And about the farm 2 pigs?

Dr. Kennedy: Farm 2 pigs were again fatter than the provincial average, not quite as fat as the university pigs but intermediate between the provincial average and the university pigs.

Mr. Dombek: We now know that 55 of these pigs that were ultimately purchased were fatter at the time of purchase, but they did have excellent health records and good pedigrees. Now, what does 55 pigs mean? It is obviously a lot more than the three or four that might have been purchased, but of the entire Yorkshire herd that was purchased by Farm Q, this represented 40 per cent of the Yorkshire pigs at the time of purchase. I would suggest to you that is significant.

Let us return to my statement that the complainant had to buy Ontario pigs. When the ministry replied to the complainant that he had no option but to purchase Ontario pigs, we were advised that the complainant could have bought pigs from the United Kingdom. We shot that possibility down in a hurry.

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Again, I would like to refer you to volume V, the buff-coloured volume, tab 127. This is the ministry's reply to Dr. Hill, the Ombudsman at that time, dated June 27, 1986. I will refer you to page 3, the first complete paragraph, which I would like to read:

"Another difficulty with your letter concerns the Cotswold Pig Development Company and the Northern Pig Development Company." These two companies are breeding companies in the United Kingdom. "The complainant suggests pigs from these companies were genetically superior to Ontario pigs. There is absolutely no evidence scientific or otherwise to support this suggestion. In fact, the enclosed paper would indicate that the opposite

conclusion would have been reached. In any event the question is academic since importation from the United Kingdom was not possible in 1983 because of an outbreak of swine vesicular disease. From February 1979 until November 1984 Agriculture Canada forbade all importations of swine from the United Kingdom. Therefore," the complainant "could not have purchased pigs from either of these companies."

One other thing I should point out was that these two companies from the United Kingdom could neither provide pedigree nor could they provide high health status under the Ontario swine herd health policy. It is very important, again, if you want to sell these pigs later on.

We were then later told: "Let's discount the United Kingdom. He could have bought pigs from Scandinavia, perhaps Denmark." Denmark also had health problems and the importation of pigs from there was forbidden. Then we were told that possibly they could have come from the United States. How far are we to go? The fact is that Canadian Yorkshire pigs are among the best in the world. In fact, I think they are the best. They are much superior to pigs from the United States and the United Kingdom.

I will not read it, but at tabs 126 and 125—tab 125 you can find in Volume IV, which is the yellow-covered volume—you will find scientific articles that indicate that Canadian Yorkshires, and in particular Ontario Yorkshires, are superior pigs.

But let's be perfectly honest. The cost of importing over 200 pigs from outside the country, when we figured the total purchase was 55 from farm 2 and 181 from farm 1, would not have been very cost-effective. If the complainant got into financial difficulties, as he alleges, buying Ontario pigs, we feel his problems would have been magnified by going outside the country.

In fact, the complainant had purchased some pigs from another unit, called barn 3 or unit 3, from outside Canada. These pigs could not be sold after going through the test station program, that is, the program that is run by Agriculture Canada, because of the fact these pigs were not registered animals. Because of the fact they were from outside the country, they did not have the pedigree and they could not be registered. So unit 3 pigs, which is a completely different unit than the complainant is talking about in his complaint to the Ombudsman, did not have the pedigree, did not have the health status and are not performing as well as the pigs in the unit 6 unit he bought from farm 1.

I would like to move on to point 3, which you will find on page 5. Basically, our contention is that the ROP data had little effect on the quality of the pigs bought from farm 1. The complainant's contract with farm 1, I should say, was not provided to the Ministry of Agriculture and Food, not physically, in the sense that we have a copy of it. But we did have an opportunity of examining it at a meeting we had with the staff from the Ombudsman's office. This contract did not indicate that he wanted the pigs with the highest ROP statistics. In fact, the individual who selected the pigs did not select the boars with the best statistics available.

To support that contention, I would like to refer you again to volume V, which is the buff-coloured volume, tab 142. This is a memo from Bob Kalbfleisch to Dr. Switzer, the deputy minister, and it is regarding the notes of the meeting with staff from the Office of the Ombudsman regarding the complainant.

I will refer you to page 4 of those notes. At page 4 you will see a titled paragraph that says "What Effect did the Errors have on the Actual Choice of Pigs?" The second indented paragraph there is the one to which I am going to refer. In paragraph 2, under (a)—we are talking about a letter the Ombudsman had sent us and had numbered—"guilts" should be spelled G-I-L-T-S instead of as in "guilty."

Mr. Bell: Maybe not.

Mr. Dombek: It depends on whom you are talking about, Mr. Bell.

Mr. Bell: Some gilts are guilty.

Mr. Dombek: You will have a hard time convincing the gilts about that.

"In paragraph 2 under (a) guilts, the selection criteria which" the general manager "is said to have followed is outlined. In response to a question, Dr. Lee admitted that" the general manager "was not interviewed and no attempt was made to contact him. Dr. Kennedy provided a list of boars that was available at the time of purchase....The list indicates that" the general manager "looked at the ROP listing for some 220 Yorkshire boars before selecting five boars. The boars selected were ranked 8, 72, 93, 140 and 162 by index." This was the ranking done by Mr. McKee. "This would indicate that" the general manager "put greater emphasis on the physical examination or other criteria, than he did for the index value."

So of some 220 Yorkshire boars which had statistics available, numbers 8, 72, 93, 140 and 162 were selected. This would indicate that greater emphasis was placed, as I said, on the physical examination. Once again, these were the actual rankings, the actual indices, that the technician created.

I asked the question, if I wanted to select the top five boars in a category, how many pigs would I have to go through before I came to the top five, if I were selecting them solely on index? The results at the test station—again, that is the test station run by Agriculture Canada—is that if you were choosing the top five, the possibility is that you would view eight boars and eliminate three of them to reach the top five. So eight pigs would be seen.

There is a substantial difference, I think, in what was actually chosen by the complainant and what he says he wanted to do. Similarly, Dr. Kennedy, at the request of the Ombudsman, ranked the boars selected by the complainant by index within the date of probing. This was another way of choosing the pigs. Again, I will refer you to the buff-coloured volume, volume V, tab 143. You will note that the first document is a memorandum from Jim Pettit to Bob Kalbfleisch, dated October 27, 1987. Basically, it just includes the letter from Dr. Kennedy, which is attached, and Dr. Kennedy's letter is dated October 22, 1987.

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I do not need to read this letter. It outlines the practice of how the Yorkshires, the Landraces and the Duroc and Hampshire hogs were selected, but I will turn the letter over. I want to read to you the last paragraph, which I think really does need to go on the record.

"I should point out that if this is indeed how" the complainant

"selected their boars, there was no effective selection on index except for a small amount in the Durocs." Two Durocs were purchased. "The selection differentials on boars would be considerably less than the amount I estimated using the whole cohort of pigs from January 9, 1984, to June 18, 1984. Therefore," the complainant's "case would be weakened considerably."

Mr. Bell: Could you just explain the documents that follow this letter? One, they are a little difficult to read, and second, I do not think we have much of an idea right now what they are.

Mr. Dombek: I will turn that over to Dr. Kennedy, because Dr. Kennedy supplied those documents.

Mr. Bell: While he is doing it, could you relate some things that are listed in the letter, sort of as an example, so that we can get a feel for what it is?

Madam Chairman: We are referring to the letter of October 22 under tab 143. There are some schedules at the back of it, in volume 5, which is the buff-coloured one.

Dr. Kennedy: The initial study I did looked at the rankings on index, and these would be the indices computed by McKee, of the boars that were selected.

Madam Chairman: Could you strike "McKee" from the record? Can you explain quietly what error was made, in terms of no reference to any names in the record?

Mr. Dombek: OMAF has no problem with the names of its technicians or employees. We have tried to—

Madam Chairman: You are right. It did not ring in what name you said until after we were—

Mr. Bell: The chairman was thinking of a general manager's name that was shown in this material.

Mr. Dombek: Yes, okay.

Madam Chairman: It is in the letters you are reading from, so be cautious.

Dr. Kennedy: Initially, I took all the pigs that were probed over the time period that selection was made. For example, in the Yorkshire breed, that was 220 pigs. Mr. Dombek has gone through that the 8th, the 72nd, etc. were selected.

The Ombudsman's office then raised the question that perhaps the pigs were not selected in that manner, that perhaps they were selected within the cohort of pigs that were probed on a given date. So I resorted the file by date of testing, or date of probing, and ranked the pigs on index and then looked to see whether or not they were selected.

If you look at the first one—it is a little difficult to read this computer printout, but I have the originals with me—the last column is either

an N or a Y. The N means the pig was not selected; the Y means the pig was selected.

If you look at the first group of Yorkshires, 10 pigs were tested on that date, February 20, 1984, and the ninth and 10th pigs, in other words, the last two on index, were selected.

That clearly indicates within that cohort of pigs there was no selection on index. Indeed, it indicates that the poorest-indexing pigs were selected, so the selection was negative.

Mr. Bell: I think it would greatly assist the committee if you would just take that column and, with the indices, show the committee why you have come to that conclusion.

Dr. Kennedy: I am having trouble reading the first figure. Perhaps I should go to my originals, but the top-indexing pig is—

Mr. Dombek: Perhaps we could just give Dr. Kennedy a second to go to the original. I apologize for the photocopy.

Dr. Kennedy: You were probably photocopying photocopies, but the first pig on the list index is 158. If one were selecting on the basis of index, one would choose that pig because he was the highest-producing pig in that group. The poorest pig indexed 111, and the poorest pig on the basis of index was selected. Also, the next-poorest pig, indexing 128, was selected. In other words, the actual selection that was practised was for the lowest-ranking pigs on index, not the highest.

Mr. Bell: Just so I understand it and committee members understand it, I think the third column is "Pig," is it not, at the top heading?

Dr. Kennedy: That is right. That is the pig identification number.

Mr. Bell: Then there are pig identification numbers. Then there are the next two columns, which are the two components of the index?

Dr. Kennedy: That is correct, "Fat" and "Days."

Mr. Bell: The first one is "Fat"?

Dr. Kennedy: Yes.

Mr. Bell: Then you have the ratings, and the second one is "Days" and that goes to growth, does it?

Dr. Kennedy: Correct, and in both measures the lower values are generally preferred, less fat and shorter days to reach 90 kilograms.

Mr. Bell: That is what I was going to ask you: In terms of fat, the lower the leaner, is that correct?

Dr. Kennedy: That is correct. Then the index is a composite measure of the two, weighting them equally, and in terms of the index, higher values are preferred, not lower.

Mr. Bell: Then if your assumptions are correct, this chart shows that the two pigs chosen had, if I am reading the index numbers correctly, the two lowest indices?

Dr. Kennedy: That is right, in that cohort of pigs, yes.

Mr. Bell: And if you go to the chart immediately below, I think I see only one "Y," if that corresponds to selected.

Dr. Kennedy: That is right.

Mr. Bell: If I am reading those numbers correctly, the animal chosen had the—

Madam Chairman: What number is that?

Dr. Kennedy: It is the 10th pig out of 15.

Mr. Bell: Is it 103?

Dr. Kennedy: Yes.

Mr. Bell: So that he had about the fifth-lowest index in that list.

Dr. Kennedy: Well, he was sixth from the bottom, yes. Out of 15 pigs probed, he was ranked 10th on the basis of index, so there were nine pigs with higher indices than that pig and there were five with lower indices.

Mr. Bell: And your conclusion is that, when you examine all of these printouts, that is the general trend?

Dr. Kennedy: I sorted them by date, and those were the first two lots. In the next lot, the third pig out of 21 was chosen and in the subsequent lot, the second pig out of 17 was chosen. That is the selection of the Yorkshire males.

Mr. Bell: How many pigs are represented as chosen by all of these printouts that we have?

Dr. Kennedy: In the Yorkshire, which is on the first page, there are 220 pigs total. The other breeds are on the next page. For example, there were seven Landrace males tested and number 5 was chosen. In the Hampshires there were only two tested and two were chosen, so all the pigs tested in that cohort were chosen. In the Durocs, there were six pigs tested and number 1 and number 3 were chosen.

That is what led me to the conclusion where I said that, with the exception of the Durocs, there was no effective selection on index. For example, in the Hampshires choosing the best two out of two is taking them all. It is no choice at all.

Mr. Bell: Thank you. That is helpful.

Mr. Dombek: I would like to digress here for a second. I liked the analogy that was used by the Ombudsman in the presentation yesterday. They talked about if you wanted to select a scholastic team and you wanted to select a team that had a higher average of people, say, in the 70 per cent range or the 90 per cent range, and you wanted to base your selection on those people who had a higher academic average over 90 per cent; that is the analogy that they used.

We were able to correlate or translate that into the actual academic, if

you want, rankings of the pigs that were selected. Using the same analogy and the same percentage, based on the female pigs that were selected, the complainant picked pigs that had an average of 25 per cent, so all you had to do was have 25 per cent or above and you were in the ballpark. As to the boars, the average he chose was a little higher, 40 per cent, but I still think both of those are pretty failing grades, if you want to use that kind of analogy.

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Mr. Farnan: May I ask a question?

Madam Chairman: I prefer that questions are reserved. Mr. Dombek has asked for that and I think we have taken him as far as we should. I will put you on the list.

Mr. Dombek: Thank you. I would like to continue and talk about the 0.3 millimetres of back fat that has been bandied about and has been referred to in the diagram. I will be asking Dr. Kennedy to give us his analysis of this diagram in a moment.

Basically, when Dr. Kennedy did the scientific testing for the ministry, he made one big assumption, that there was absolutely no correlation between the measurements taken by Mr. McKee and taken by subsequent technicians. If there is no correlation between the measurements, then the maximum discrepancy would be 0.3 millimetres.

I did not understand it; I do not have a scientific background myself. A correlation is based on the number one. A 100 per cent correlation, if I can use that, would come out to one, and a zero correlation would come out to zero.

Therefore, Dr. Kennedy was able to conclude that based on this 0.3 millimetres—that is the worst-case scenario using no correlation at all—it would take one cycle of breeding, one gestation period, for the problem, if it existed, to be bred out of the pigs. But in fact there is a correlation between the measurements taken by Mr. McKee and other technicians. That correlation is 0.53, a little more than half.

Normally, we would expect a correlation to be either 0.7 or 0.8 or—Dr. Kennedy would probably slap my wrist if I was in his graduate class—in the 70 to 80 per cent range. But these were over 50 per cent. You can see that the amount of difference was not that significant between what we would expect in the measurements and what was actually obtained.

Once again, I would like to conclude this part by saying that the 0.3 millimetre loss of back fat would be approximately one half of what Dr. Kennedy came up with, around the 1.51 to 1.6 range. At this time, I think it would be useful for Dr. Kennedy to elaborate on that and perhaps talk about the diagram that was presented.

Dr. Kennedy: Just for background, I was asked by the ministry to come up with the worst-case scenario in terms of the selection of pigs from farm 1. This estimate was based on the given that farm 1 had already been selected; we were looking at the pigs then selected within that farm. What I did was use the selection practised by Farm Q of the pigs in farm 1 and calculated what it should have expected in terms of the sample of pigs it drew based on the key statistics.

I came up with an estimate of a little better than 0.3 millimetres; that

is what they should have expected. If McKee had been totally wrong, in other words, had just been drawing numbers out of a hat, they would not have expected any response. That is where the maximum comes from.

In doing those computations, I did take into account this question of the variation that is being raised. I used the variability factor that would be expected in unit 6 of Farm Q. I did not use the 0.92 figure; I used the figure actually greater than two. I believe it was 2.5. That is where I came up with this 0.3 figure here. Had I used McKee's variability factors, that would have been approximately 0.15, and had I assumed that there was this correlation between McKee's probes and the other probes, that figure would come down lower still, in the neighbourhood of about 0.07. So that is the maximum.

The other question then relates to the genetic value of the herd chosen, because this is the difference between the pigs that actually were going into Farm Q from farm 1 and the genetic average of farm 1. Then it relates to this question mark, what is the genetic average of farm 1? Subsequent to these probing errors, we have developed techniques that allow us to evaluate that. This is no longer a question mark. Indeed, I do not know where it is in your volumes, but it is in the first report I provided to the ministry. That question mark is down here, about minus 0.35 millimetres.

Mr. Dombek: That first report, for the record, is found in volume III at tab 60, which is the blue volume, if you want to refer to it.

Mr. Bell: What page? Do you know?

Mr. Dombek: It is a report dated March 18, tab 60, the blue volume.

Madam Chairman: Ms. Morrison, is this anywhere in the black binder?

Ms. Morrison: Yes.

Mr. Bell: Can you give us the page reference, Mr. Dombek, for that particular calculation and amount?

Mr. Dombek: I will have to ask Dr. Kennedy.

Dr. Kennedy: The 0.35 is covered in the text, but it is also located in table 1. I do not know if you have blacked out the identifications of the herds so that you have to search for it, but I think it is the herd that is labelled "c" with the "c" subscript, that is, farm 1.

That is our estimate of the average genetic merit of that herd in 1982 to 1983 relative to other ROP herds.

Mr. Farnan: Would you say that last bit again?

Dr. Kennedy: That is the average genetic merit of that herd relative to the average ROP herd at that time in the period from 1982 to 1983. So that herd was genetically leaner than the average herd. Considering both back fat and growth rate, where that herd was clearly highly superior to the average herd for growth rate, that led me to the conclusion in that report that selection of farm 1 was a reasonable choice—was a "sound choice," I think, were the words I used—for breeding stock for combined performance for growth rate and back fat.

My data indicate that the genetic A' is down here. So we shift all this

down and then we say, "How much was lost in the second selection?" In other words, selecting pigs within farm 1, I came up with an absolute maximum; taking every statistic used as a worst-case scenario, I came up with a value of approximately 0.3 millimetres. If I took what I feel would be more realistic measurements, it would certainly be half that.

Mr. Charlton: Are we not talking about two different things here, though?

Madam Chairman: Excuse me, committee members. I am going to stop you, Mr. Dombek, because a number of committee members are concerned that some of the information that is coming up is so technical that if they reserve their questions—albeit it throws off your train of thought and I respect that you have only 40 minutes with only a few questions. The other thing is it is throwing them off and they are trying to write this down. Their concern, though, is that that they will forget and lose it.

Mr. Dombek: I do not have any problem if we keep it to the technical aspects of it.

Madam Chairman: That would be helpful, I think. Now the problem is there are some people who want technical questions from 10 minutes ago, so it makes it a bit tough.

Mr. Charlton: I just want to ask questions about the chart.

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Madam Chairman: If yours is on this, perhaps we can at least entertain that one.

Mr. Charlton: I am going to have to consult both Dr. Kennedy and the Ombudsman's staff here because it is their chart that you are now interpreting. But my understanding of the original chart and the original A' which they put up at the top is that it is strictly the fat thickness measurement where the A' you are now adding lower down is the combined indexed figure, is it not?

Dr. Kennedy: The mixture is actually in the original chart. This is a genetic difference in the original chart and this is a phenotypic or actual fat measurement of the average of the herd. What I am giving is the genetic average of the herd, which is the more appropriate statistic to compare with this because this is a genetic measure.

Mr. Charlton: It may be more appropriate to compare with that, but in terms of what you were suggesting, that it is not way up here, it is down here. We are talking about two different figures in terms of what their A' represented. I just wanted to make that clear to the committee.

Dr. Kennedy: Yes, in the sense that their A' is a mixture of apples and oranges. One is a genetic measure and—

Mr. Charlton: Okay, I just want that to be clear so that everybody understands that it is not necessarily error we are talking about; it is two different figures.

Dr. Kennedy: What I moved was the question mark. I believe the question that was raised earlier was, "How much of this difference is genetic

and how much is management?" That was the question as I understood it, so I moved the question mark by saying: "We know what was genetic, and actually it was a better-than-average herd genetically. It is the management factor that would"—

Mr. Bell: In a little refresher from yesterday, the Ombudsman told us that A was the general average of herd 1, as contained in the data published by the program. That is the index.

Dr. Kennedy: It would not be the index.

Ms. Morrison: Back-fat measure.

Mr. Bell: Sorry, it is the average of back fat only, A. All right? Are you with us?

Dr. Kennedy: Yes.

Mr. Bell: B is the average back fat of the pigs selected in herd 1?

Dr. Kennedy: That is not correct.

Mr. Bell: That is what they believe it to be.

Dr. Kennedy: This was what we call the genetic selection differential. B is the measure of the distance or difference from the genetic average of the herd for the pigs selected. In other words, we are asking, "Do we think the pigs selected from the herd are better or worse than average for that herd genetically?" That is the difference between A and B.

Mr. Charlton: Why is it in millimetres?

Dr. Kennedy: I think that is the law.

Mr. Bell: Yes, but let's stick with this because the Ombudsman's staff—I will invite them to correct me if I misstated what they said yesterday—we went over it about three times, that A was the back-fat general average of herd 1 and B was the back-fat general average of the pigs selected. They are nodding yes and you are shaking no.

Dr. Kennedy: I computed the figures, so—

Mr. Dombek: These are Dr. Kennedy's figures. They are his statistics.

Mr. Bell: I appreciate that. It is quite a fundamental point if both parties are not ad idem on what those figures represent.

Mr. Dombek: Personally, I would go with the author of those statistics.

Mr. Charlton: You are asking what the averages were of the index?

Madam Chairman: Just a minute. Could you two maybe have just a three-minute discussion and try to figure it out?

Mr. Dombek: We had a discussion. Dr. Kennedy had a discussion quite extensively before lunchtime yesterday with Dr. Lee about that chart.

Mr. Charlton: They still do not agree, though.

Dr. Kennedy: I do not think it would be a productive discussion.

Madam Chairman: It is just confusing all the questions. Mr. Charlton is going all over this chart. It would help us if we were comparing the same things.

Mr. Dombek: I think what you are seeing is the fundamental problem in that the Ombudsman's staff unfortunately misinterpreted the figures provided by Dr. Kennedy. Dr. Kennedy is the author of those figures. He is telling us now what his study shows. What we heard yesterday was not correct.

Mr. Charlton: I repeat my question. Regarding those two averages, A and B, A is the average index of herd 1 and B is the average index of the selected pigs—

Mr. Dombek: No, you are missing the fact that—I will let Dr. Kennedy explain, but there is a difference between the genetics and the phenotypic or the management back fat that would occur, completely different. Mr. Charlton, you are a thin individual compared to me. If we were to eat the same amount of food, I would probably get proportionately thinner if we were put on the same \$1,000—I mean 1,000-calorie diet.

Mr. Bell: You were right the first time.

Mr. Dombek: I was not going to use you, Mr. Bell.

Because our genetics are different—I am a bigger individual than you are—I am going to have a different rate of loss or something than you would. The feeding, the environment and so on is the management, but it does not affect our gene makeup.

Mr. Charlton: No.

Mr. Dombek: I just want you to understand that.

Mr. Charlton: All right. That has nothing to do with the question that was put, on the answer to which the two gentlemen here disagree. The question was asked, are A and B representing the measurement of back fat or genetics? This gentleman says back fat, this gentleman says genetics. The 0.3 is millimetres. That is measurement of back fat. That is not a genetic factor; it is a measurement. My question is, what does the 0.3 represent, measurement of back fat or not?

Dr. Kennedy: What you see in genetics is not always what you get, okay? When you look at differences between individuals, some of those differences are due to environmental factors across farms, for example, how the pigs are raised, ventilation conditions, health conditions, and there are also environmental differences within a farm. One pen may be better than another, one may get better access to feed, etc.

When I measure this, I am taking what are the genetic differences or the expected genetic differences between the pig selected and the genetic average of the herd. To do that, I use a factor that we call heritability. That is just saying what proportion of differences within a herd or farm is due to genetics and what proportion is environmental. In back fat it is about a 50-50 split. I say, what is the selection intended? I will call this factor I, intended selection. We do this on a standardized scale, but that is saying the question you are asking, how much fatter or leaner phenotypically, as we

measure it, are the pigs that were selected on the herd average.

So we take that, and I will call that factor I, and then the last factor we use is the standard deviation or variability, which is the debate about the 0.9 and the 2. Actually, I use the value of 2.5 to create that difference. This value was approximately, I believe, -0.25 millimetres. When I compute all that, I come up with a value of three millimetres of back fat, and that is a genetic measure. That is saying that the pigs that were selected based on the selection practised in that herd would be expected to be 0.3 millimetres leaner than the average pig genetically in that herd.

Mr. Charlton: Okay, I understand all of that.

Dr. Kennedy: That is all that difference measures. What the Ombudsman has tried to do is confuse that with phenotypic performance, and that is where this chart is rather misleading. You will see this is the difference here, but this is the true difference, because this question mark here is what is the difference between that herd average and the genetic value of the herd. Part of this is management and part of it is the genetic value.

Mr. Charlton: No, the question that I was trying to get at, though, is the question of where—see, you are creating for us, I think, a misimpression by calling your red A' A', because it does not relate to the measurement of fat.

Mr. Dombek: Madam Chairman, I am going to take exception. I do not think Dr. Kennedy is trying to mislead or misinterpret.

Mr. Charlton: Okay. In other words, the A' the Ombudsman's office put on the chart—

Mr. Dombek: I should also point out that these are the statistics that the Ombudsman used that were Dr. Kennedy's statistics. He is the author of them.

Mr. Charlton: It is not a question of whose statistics they were; it is a question of whether the committee understands what is happening here or not.

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Madam Chairman: Mr. Charlton, I think you should refrain from your "misleading" comment.

Mr. Dombek: Dr. Kennedy is an animal geneticist. Mr. Lee is not.

Madam Chairman: Thank you, Mr. Dombek. Mr. Charlton, if you could conduct your questioning in a more pleasant tone, then I would allow you one more.

Mr. Charlton: The question I am trying to get at is that my understanding of the A', which the Ombudsman's office put on the original chart, was a questionable location for the real average fat thickness in herd 1 based on real measurements as opposed to incorrect measurements of fat. Am I correct, Mr. Lee? We understand from everything that has been said by both yourself and the ministry that in fact McKee's measurements of fat were low. Correct? So if McKee's measurements of fat in reality were low, the A', which is represented on the original chart by the Ombudsman's office, is above the A

average from the McKee measurements? Am I correct?

Dr. Kennedy: Yes.

Mr. Charlton: All right. All I am suggesting to you is that you are confusing the committee by suggesting that your A' is comparable to the A' up there and that it was wrong to put it up there in the first place.

Dr. Kennedy: If I could answer the question, the confusion then arises that the original chart is badly constructed.

Mr. Charlton: Maybe.

Dr. Kennedy: That this A-B is not, as reported here, the average ROP values for the samples selected from herd 1 as deviated from the average for the public ROP values. This 0.3 millimetres is a genetic measure. What I was trying to establish was: What is the genetic level of the herd? That is the correct thing to do. I should point out that this is my statistic, but I do not recall the genetic consultant from the Ombudsman's office having any quarrel with that statistic. I believe he agreed with it and agreed that it was the reasonable thing to do.

Madam Chairman: Can I just interrupt for a moment with the Ombudsman? Can you during the lunch-hour check the Hansards we have—

Ms. Morrison: I could draw your attention, if it would help, to page 80 of our materials in which that selection differential is defined in Dr. Kennedy's report.

Madam Chairman: Also, when you check the Hansard, we had understood that your information you used on your chart may have come from the complainant. Now it might be from your geneticist and now it might be from Dr. Kennedy's paper. Could we have all that clarified after the noonhour? That would help.

Ms. Morrison: Yes.

Mr. Bell: Dr. Kennedy, can I just ask you something without values?

Dr. Kennedy: Yes.

Mr. Bell: It is generally acknowledged by everyone, including yourself, that McKee was getting measurements that were lower than actual. If we stay with herd 1, common sense tells us that the published or the calculable general average back fat for herd 1 would be actually higher than published.

Dr. Kennedy: Yes. We are all in agreement on that.

Mr. Bell: All right. This is not a statistical principle, but it is likely, therefore, that the general average back fat of the pigs actually selected would be higher than published, right?

Dr. Kennedy: Yes.

Mr. Bell: I do not think anybody has ever calculated what the actual differential is.

Dr. Kennedy: We have estimated on the basis of the pigs that were probed jointly by McKee and Lambert that that was 2.4 millimetres, I believe.

Mr. Bell: But nobody probed with equipment that worked and interpreted appropriately the actual pigs selected to get an actual reading?

Dr. Kennedy: That is right.

Mr. Bell: This is in the area of we can put whatever description on it we want, depending on what point of view you have?

Dr. Kennedy: That is correct.

Mr. Bell: We do not actually know what the actual differential between herd average and selected pig average was or is?

Dr. Kennedy: No. That is the point I was trying to make. I was saying that that is where this 0.3 millimetres comes from, and saying if McKee's figures were correct, they would have expected a group of pigs that were 0.3 millimetres better than the herd average.

Let's assume they are totally incorrect. They would expect only the herd average, because that would be equivalent to drawing pigs at random or numbers out of a hat. That is where I arrived at the maximum of 0.3 millimetres difference. I am saying, okay, let's pretend that these figures are correct, this is what they would have got; let's assume that these figures are totally wrong, this is what they got, and the difference is 0.3 millimetres. The truth is somewhere in between, but we are not exactly sure where it is.

Mr. Bell: All right. For the committee, what you are saying is that, regardless of correct or incorrect, the average differential would remain constant in relative terms and your figure is 0.3 millimetres?

Dr. Kennedy: Yes.

Mr. Bell: In other words, the pigs you got, on McKee's readings, would be in fact roughly within 0.3 of the average herd.

Dr. Kennedy: Yes. If the figures were correct.

Mr. Bell: I think that is the case even if they were not correct.

Dr. Kennedy: No. If they were totally incorrect, then you would not get the average, because it would be the same as if I just picked numbers out of a hat and put them on the pig that had no relationship at all to the genetics of the back fat of the pig. You would just get an average sample from the herd.

Mr. Bell: Yes, but again, and let's stay in the area of common sense, if we can, even though the actual would have been 0.3 difference—I sometimes think this 0.3 is a bit of a red herring—given McKee's figures, they are still getting fatter pigs than they thought they were getting.

Dr. Kennedy: Given McKee's figures, they would have expected those pigs to be 0.3 millimetres leaner than average. If McKee's figures are wrong, they would get less than that.

Mr. Bell: Yes, but in absolute terms they are getting fatter pigs

whether they are relatively closer to the average or not.

Dr. Kennedy: That is correct, yes. My argument is that the maximum of that would be the 0.3 millimetres, because if McKee's figures were totally wrong, if we got a zero correlation, they would have had pigs that would have been the herd average.

Mr. Bell: All right.

Dr. Kennedy: And at a correlation of 0.5, it is about halfway in between.

Mr. Bell: One element that we have not talked about, and that is probably for the Ombudsman, is, what was the focus of the complainant in terms of absolute leanness in the selection process? Whether he was looking for pigs that were better by 0.3 or whether he was looking for absolute leanness is something not part of this exercise.

Dr. Kennedy: No.

Mr. Bell: I do not know whether we know, frankly. Okay. That is fine.

Dr. Kennedy: We have seen the published stat figures, the McKee figures on the pigs they selected, and in many cases they were the fatter pigs—those lists I went over with you earlier.

Mrs. LeBourdais: I realize you have been trying to keep questioning to this chart, but now if we do break at lunchtime and then we have a two-hour break, it makes it very difficult, I think—I will just speak for myself at the moment—to keep track of all this and to try to ask questions about things we have heard this morning and have not been able to address at all. I do not know what the answer is, because I appreciate the fact that they would like to present their case, but as I say, I am finding it difficult to keep track of everything and get back to the points I would like to.

Madam Chairman: I think the beginning of the problem was the questions that started off the morning and shortened the time that was available for the presentations, which was not the ministry's fault at all. How much longer do you think you will be with this chart, to totally eradicate any sense of misunderstanding?

Dr. Kennedy: I can clarify it here. My chart is that the average in population is their zero. Our estimate of the genetic average of herd A at the time was 0.35 millimetres less than the population or leaner, and then the best-case scenario would be those pigs selected within that population were another 0.3 millimetres leaner. As correctly pointed out by Mr. Bell, they probably did not realize this but realized something in between.

Mrs. LeBourdais: Thank you.

Dr. Kennedy: That is the point I am trying to make.

Madam Chairman: Would you agree to questions on what you have presented thus far and then start after the noonhour break with a new train of thought? What would you prefer, Mr. Dombek, given that you have been very patient?

Mr. Dombek: Yes. I am not finished this portion yet of the

ministry's position and what the Ombudsman said about it. There were a couple of other points I wanted to make regarding it. I do not know what your time frame is, if you want to or if you can go past noon.

Madam Chairman: We can.

Mr. Lupusella: I am proposing that we allow for the gentleman to make the presentation and to rise around 12:30 p.m.

Mr. Farnan: I propose that we close at 12 p.m. I think in fairness to Mr. Dombek and the case they are presenting, they should have the same privileges as the Ombudsman. Therefore, they should go to 12 p.m., come back and continue with their presentation. I think we have a responsibility to get our questions down and present them at the appropriate time.

Mr. Dombek: I would appreciate that.

Madam Chairman: Good. Thank you. Maybe for another 10 minutes or so and then we will come back at two o'clock.

Mr. Dombek: Perhaps what I can point out is that the results of all this indicate that the pigs from the farm 1 herd were superior pigs even with the inaccurate back-fat readings that were conducted by Mr. McKee. I think that is the end of that portion.

I just want to perhaps indicate one other thing, that there was some discussion—actually, maybe I should stop, because I think this discussion will get into the culling aspect of the Farm Q pigs and there may be some questions about that later on that might arise. Perhaps to give it justice we should continue after your break, but I am in your hands.

Madam Chairman: How about if we break now and resume at 1:45 p.m.? Is that acceptable, committee? That will give us a little more time this afternoon. We are adjourned until 1:45 p.m.

The committee recessed at 11:52 a.m.

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STANDING COMMITTEE ON THE OMBUDSMAN

CASE OF FARM Q

WEDNESDAY, MARCH 29, 1989

Afternoon Sitting



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Bossy, Maurice L. (Chatham-Kent L)
Carrothers, Douglas A. (Oakville South L)
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Cousens, W. Donald (Markham PC)
Henderson, D. James (Etobicoke-Humber L)
LeBourdais, Linda (Etobicoke West L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitutions:

Cureatz, Sam L. (Durham East PC) for Mr. Pollock
Farnan, Michael (Cambridge NDP) for Mr. Philip
Johnson, Jack (Wellington PC) for Mr. Cousens

Clerk: Carrozza, Franco

Staff:

Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon
Wilson, Jennifer, Research Officer, Legislative Research Service

Witnesses:

From the Ministry of Agriculture and Food:

Dombek, Carl F., Director, Legal Services
Pettit, Dr. James, Director, Animal Industry Branch
Urquhart, Dr. Ron G., Manager, Improvement Programs and Animal Care Services,
Animal Industry Branch

Individual Presentation:

Kennedy, Dr. Brian, Professor, Department of Animal and Poultry Science,
University of Guelph

From the Office of the Ombudsman:

Morrison, Gail, Director, Investigations

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Wednesday, March 29, 1989

The committee met at 1:56 p.m. in committee room 2.

CASE OF FARM Q LTD.
(continued)

Madam Chairman: We can call the meeting to order. Perhaps, Mr. Dombek, you would start with your presentation again. While we will try to let you do it uninterrupted, could you sort of indicate when pauses come? As I noted, I think there were a lot of questions that might have cleared a few things up or even helped the case along.

Mr. Dombek: Thank you. We finished this morning on a highly technical note. Frankly, I was concerned about that, because it is too easy for us to get bogged down in scientific data. I apologize for that fact. But I think what we can learn from Dr. Kennedy's study and his results are three items or three conclusions: (1) the herd the complainant selected was a genetically good herd, in fact, probably one of the best in Ontario at that time; (2) the probing error by Mr. McKee did not compromise the complainant's pigs nor did it compromise any other part of the program; (3) the root of the complainant's problem lies in its buying practices.

I can also state this fact: the Ombudsman hired an animal geneticist to review Dr. Kennedy's work. After that review and the joint meeting between Dr. Kennedy and—is it okay to mention his name?

Madam Chairman: Yes.

Mr. Dombek: —Dr. Roger Cue of Macdonald College, both scientists agreed on the methodology that Dr. Kennedy followed and with the conclusions that were reached. I am not going to read from it, but that agreement can be found in tab 139 of volume V, the buff-coloured volume. As I say, I am not going to read it, but it is there.

Next, I would like to continue in this area and indicate that yesterday we heard that the complainant and his pigs have improved because of a great deal of culling that was done from the original herd. Unfortunately, that is not the case. At a meeting that was held with the staff from the Office of the Ombudsman— Let me just find my tab number here; I have referred to it before.

It was the meeting held in March, I believe, between the staffs. There was a covering letter from Mr. Kalbfleisch to Dr. Switzer. It is found at tab 142 in volume V. That first covering memo, as you will see again, is just concerning the attachment, the minutes of that meeting. I refer you to page 4 of those minutes.

On page 5, about the middle of the page, there is small a in brackets. That particular section is headed "0.3 millimetres of back fat." The third indented paragraph reads: "Dr. Kennedy provided information indicating that the unit 6 pigs"—these are the complainant's pigs he bought from farm 1—"are now as good as or slightly better than...unit 3 animals. (It is suggested by [the complainant] that unit 3 sales are profitable.) He also indicated that he

has information showing that the unit 6 pigs are the progeny of the original animals from the herd. This shows that the animals have performed as Dr. Kennedy indicated they would in his original reports and have not been 'sold for bacon' as press reports have indicated."

In fact, the statistics show that, in the Yorkshire area, by June 1985 57.5 per cent of the animals—and if I am misconstruing this, Dr. Kennedy, please correct me—were from the original herd and that by the end of that year 46 per cent were being bred from the original herd. In the area of the Landraces, the other pigs, 100 per cent were being bred from the original herd by June 1985 and 68.9 per cent were being bred from the original herd by December 1985.

One may ask: How do we determine that those pigs are actually from the original herd? Earlier today, I mentioned that there are some methods of tattooing or tagging pigs. Each one of the animals has an ear tag. It is a unique tattoo to that animal that is a personal identifier, if you want, of that particular animal. Furthermore, the ministry has never received any information as to the number or amount of pigs that were culled from the herd.

I should also like to point out that it is the normal practice to cull some herds for breeding purposes. Again, we have to think of the bell curve situation. If you are looking for the top percentage of those pigs to breed a certain characteristic into your herd, you are going to drop the lower numbers, so you would probably have some culling. You may perhaps have some culling done for animals that have been injured or have some other problem like that. But the idea is to breed the best animals with the best animals you have so that the good genetics come out. That is standard industry practice, and I do not think that is disputed.

I would like to move on to the next point on page 5 of the synopsis of the Ombudsman. That deals with the statement by the ministry that the complainant used the home test statistics incorrectly.

Ms. Morrison: Page 6 of the document, point 5 under the Ontario Ministry of Agriculture and Food's position.

Mr. Dombek: Sorry. Again, I am referring to a document that is not in the black binder. The point number is 3; it is that the complainant used the record of performance data incorrectly.

Ms. Morrison: Page 7A in your binder.

Mr. Dombek: Are we all there? Under point (a), "within herd selection," I would suggest to you that picking pigs indexed numbers 8, 72, 93, 140 and 162 is not the correct use of the home test data. One would have expected the selection to be in the top eight, from the experience we have found at the test station run by Agriculture Canada. You will remember I referred to that earlier.

I would also like to refer you back to tab 143 of the buff-coloured volume V. There again, I refer you to the letter that follows on the second page by Dr. Kennedy to Dr. Pettit. It is dated October 22, 1987. This was a minor study, I suppose you would call it, where Dr. Kennedy ranked the boars selected by the complainant by index within date of probing. If you flip over the page—again, I think it bears repeating—the final paragraph in that letter says, "I should point out that if this is indeed how" the complainants "selected their boars, there was no effective selection on index except for a

small amount in the Durocs." You will recall that in the appendix that followed, after some questioning between Mr. Bell and Dr. Kennedy, it was explained how the pigs were ranked. I need not go into that in any more detail, I do not think.

As to item (b) on that same page, titled "between herd selection," unfortunately, I think this is an area where there is just some gross confusion between the two elements of the ROP program. You will recall yesterday afternoon how Dr. Pettit explained that there is the test station that is run by Agriculture Canada and that then there is the home program. The test station is how you select your breeder. You then go to the breeder and look at his home program statistics and you choose your animals that way.

By using this, the complainant really chose his pigs incorrectly. If he chose the pigs, as we heard yesterday, by looking and even placing some weight on those home statistics and saying, "Gee, this must be a superior genetic herd based on these home statistics," then that was a fatal error on his part. He should not have used those statistics for that purpose. He should have relied on the test station statistics themselves, not saying, "Wow, the figures of McKee in relation to part 2 or the OMAF figures, the home test, are so good that we've got a fantastic herd." That was a clear mistake on his part.

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The statements that are conveyed in the report of the Ombudsman, which have been referred to you, that have been taken from the brochures of the ministry, from the information, are not contradictory. When you read them in the context of the entire brochure and in the paragraphs that precede and follow them, you will see that the ones that allegedly support the complainant's position really refer to selecting your pigs within the herd and do not suggest that you use the home test figures to select your breeder.

Now, these warnings, I should advise you, are warnings that have been approved by the national advisory board, which we heard about earlier, and are the same warnings that are found for all the provinces. They are nothing new to breeders throughout the country.

Some emphasis was put on the fact that, in any event, the industry was out there doing this, misusing the data. Well, I have to ask the rhetorical question: Can the ministry be responsible for the industry misusing the data?

I would suggest to you that if you do not follow the speed limit, and a lot of people do not follow the speed limit on a highway, using the excuse that everybody else is speeding is not necessarily going to get you out of a ticket. But we have also to remember that there is no evidence that the ministry knew of this practice or that this practice was going on.

My colleague referred to Dr. Fredeen's report, in which he states that the industry was using this practice. May I remind you of the date of that report? It was subsequent to all the brochures. It was after the complaint arose. So the first evidence we have that the industry is misusing this in any documented form is in Dr. Fredeen's report, which came after the fact.

I would suggest, notwithstanding the general warnings that the ministry had given to the industry and to the complainant, that this complainant is in an unusual situation. He received a specific warning. I think this is crucial, because it would be my submission that once you have received a specific warning and you have decided to ignore it, then you are certainly at your own peril.

Again, in volume V, the buff-coloured volume, tab 127, we have a letter to Dr. Hill, dated June 27, 1986.

If you go right to the end of that grouping of pages, you will see that the very last page is a letter to Dr. Ron Urquhart. It is on the complainant's letterhead. It was signed by a director of the company, a director of the complainant, who was an animal geneticist. I want to emphasize that: He was an animal geneticist.

In that letter, he questions Dr. Urquhart regarding some statements in the ROP swine reports. Again, I can let you read this at your own leisure. I do not want to take up too much time, but if you flip over two pages going towards the front, you will see Dr. Urquhart's reply. His reply is dated February 1, 1983, well before the order for these pigs was given to farm 1. I think this should be read into the record:

"Dear [complainant], This is in reply to your letter of January 11, in which you state that you believe the statement in the Ontario ROP Swine Report, 'Between-herd comparisons wherever possible should be based on test station data,' could be dangerously misleading.

"This sentence is preceded by the following sentences pertaining to home test data:

"'The ROP home test measures the performance of boars and gilts tested on the breeder's farm. As differences in feeding, management, ventilation, etc. between the different breeders' herds can influence home test results, the home test information on individual pigs should be used for comparisons with the breeders' herd average and not for comparisons between herds.'"

Yet we heard yesterday that when the complainant saw the ROP home test information, he was so overwhelmed by these figures that he thought he had found another Hemlo gold mine.

He continues: "As I think you will agree that comparisons should only be made between the performance of pigs tested under the same environmental conditions, the principle of making between-herd comparisons based upon test station data where all pigs in a contemporary group are tested under uniform conditions appears to be sound."

He then goes on to discuss another item that was brought up by the director in his request regarding how many boars should be in the test and so on.

I have Dr. Urquhart here, in the event that members of the committee wish to ask him questions about that letter and what he meant when he signed it. Again, the point is that this particular complainant received a specific individual warning.

I would suggest that if the complainant used the home test data to pick the herd, which is what we understood yesterday, he misused the data. He should pick the herd through the test station, as has been mentioned a number of times, and then make his selection based on that home test information.

Moving on to the next point, going back to the synopsis, excessive fatness was not due to genetic factors. I should point out that the first pigs that were sired from this herd were not excessively fat as a genetic factor, and I underline the word "genetic." Mr. Charlton and I got into a bit of a

discussion about the difference between phenotype and genetic fatness. Again, to explain to you, it only applies to excellent herds. It does not apply to a herd with good health status or less than good health status; it only applies to those situations where there are herds with excellent health status. You move them to a new environment and they become fatter through a number of issues.

The Ombudsman's answer to that is that there is no scientific evidence in that regard. Dr. Kennedy took a look at that situation and he agreed. I can tell you right now that he is working on a paper at this very time in which he is going to be able to prove that proposition. What I would suggest is that he has probably added another page to his already heavy curriculum vitae.

Once again, it is the industry's experience that when you bring excellent-health-status pigs into a new environment, they will be fatter due to the management techniques rather than through their genetics. I think that is well known throughout the industry.

1420

Dr. Kennedy can show you a comparison between the complainant's first run of pigs and the University of Guelph's first run of pigs, both of which have excellent health status. What would be interesting to see in those figures is the comparison. In fact, they are right on; they are identical.

Moving on to the next point, that the complainant was primarily interested in excellent health status and pedigree: First, again, I have to indicate that there is no evidence to show he was interested in other areas. The evidence that we do have that has been documented is evidence showing that back fat or leanness was not a high priority. Again, that is the letter to the University of Guelph and his buying practices, particularly his buying practices from farm 1 and farm 2, which was known to have fatter pigs at that time.

Second, there is no evidence at all given to the Ontario Ministry of Agriculture and Food to corroborate the statement that absence of any one factor, such as leanness, fast growth rate, etc., would cause the herd to be a financial failure; none. We have never seen it. That is a bald statement and, unfortunately, I cannot accept it. In any event, if it were true, why has it been suggested that the complainant would have bought pigs outside of Ontario, such as from the Cotswolds in the United Kingdom or other areas, which would have led to an absence of excellent health status?

I would suggest that that is an inherent contradiction, because if he did not have excellent health status from the pigs coming in from outside of the country, he would not have had all the factors that have been listed by the Ombudsman. I would suggest that the complainant cannot have his cake and eat it, too. That is a clear contradiction.

In the documentation—I will not bore you with it—there has been some analysis of the pigs purchased at the complainant's unit 3 or barn 3. The history at unit 3 is that the complainant did purchase some pigs from the United Kingdom. Those animals did not receive excellent health status.

Those animals, which were referred to earlier, have been a failure up to this point because they would not be bought because they did not have any pedigree or the excellent health status that was required. Again, it shows you the inherent contradiction that is in that statement.

Moving on to the last point, number six on that page: Subsequent performance shows that the pigs purchased were good pigs. Again, the Ombudsman suggests that this is not relevant. I would suggest to you that it is relevant because we have shown that the information given to the Ombudsman's staff is that there has been a high use of the pigs from farm 1 in breeding further on down the line.

Again, we have no evidence before us. We were never given any evidence that the complainant sold all the pigs that he purchased from farm 1. We would assume that some normal culling did take place, as I indicated earlier. I do not think I need to repeat that proposition.

It is our position that while the complainant claims it used the record of performance test data to its detriment, the fact is that any pig selected had to meet the complainant's physical inspection test before the indices were considered. We know that his general manager went and eyeballed the animals and then picked a random number, it seems.

The complainant's description of his purchase led the Ontario Ministry of Agriculture and Food to conclude that he had not specified any requirements regarding back fat. Back fat was only one of the many criteria used in the selection process. It had to be. This is clearly illustrated by the fact that of the 200 Yorkshire boars available at farm 1, the complainant selected 8, 72, 93, 140 and 162 on the index prepared by Mr. McKee. In other words, no selection for fat was in effect carried out. This was also seen in other breeds and in the females he purchased from farm 1.

The complainants purchased 55 pigs from farm 2, a herd which did not have as good a back-fat measurement as farm 1. We can only conclude that his purchase from farm 2 suggests that his interest in back fat and daily weight gain was of minor concern. The pigs from farm 2 have poorer results for back fat than farm 1. We know all this because the complainant has still stayed on the ROP program. He has not been that dissatisfied with it that he has left.

The complainant's interest in other criteria was evident even before his purchases from farm 1. We have talked about the University of Guelph letter and so on. Again, I refer to you that in that letter the complainant did mention two specific criteria: pedigree and excellent health status. He did not mention back fat or daily weight gain.

The facts already submitted by this ministry point to the conclusion that the complainant was primarily interested in excellent health status. I think that is where his buying practices, all the facts lead you to: to excellent health status, to purebred pedigrees and to conformation. The complainant's claims that he relied, to his detriment, on ROP test data must be qualified by the repeated OMAF warnings regarding use of these statistics.

One warning at least, as I told you and read to you, was aimed at the complainant's activities well before he bought these pigs. I should indicate that OMAF's warnings are supported by geneticists knowledgeable in the area. The use of average home test results is inappropriate when selecting a supplier. Again, I will not go into any detail about the individual letters that were sent to the complainant.

All the geneticists who worked on this—Dr. Fredeen, Dr. Kennedy and Dr. Cue—agree that the practice of making purchases based on the average home test results was incorrect. It is just not the ministry's geneticist.

The subsequent performance by the complainant's pigs is very good. The particular unit complained about, unit 6, continues to be in the top 25 per cent of the provincial average genetically for back fat. It is the experience of the industry that the first run of excellent status pigs under the Ontario swine herd health policy in a new environment may have a higher back-fat level than their parents. This is caused by a number of factors unrelated to the animals' genes.

While no papers have been published regarding OMAF's position on the initial performance of the excellent pigs, the theory itself is common knowledge. The complainant's results and the data from the University of Guelph provide further support.

As I indicated, the complainant has continued to use the ROP program and has allowed the ministry to monitor the herd of unit 6. Subsequent information would confirm our predictions regarding the herd's performance. The ministry maintains that the complainant received the pigs from farm 1 that he ordered and that any perceived problems were caused by his purchasing practices. Again, this was confirmed, I think, by Dr. Kennedy's study.

The complainant continued to keep and utilize a higher percentage of the pigs from farm 1 than from farm 2. Granted, he bought more pigs from farm 1 than farm 2, but when you look at the percentages, I think you can see that they are higher. The results of his continued testing and breeding programs under the original herd have been good. The high quality of the unit 6 pigs supports the ministry's original prediction regarding the expected performance.

OMAF maintains that the complainant's arguments lack merit. Our position on the use of the home test data remains the same. We have been consistent all the way through.

1430

In conclusion, I was reminded yesterday of the difference between perception and reality. It would be very easy for this committee to take the perception route over reality. It would be simple enough for the committee to say: "OMAF agrees that the statistics were wrong. They should be liable." I submit to you that that would be ignoring the reality of the situation. At times we all must take stands, perhaps politicians more so than most, and support the reality of the particular situation. The facts in OMAF's case are very real. While a mistake was made, the complainant did not suffer, nor does the evidence show that he selected the wrong pigs because of the error conducted by the ministry. In fact, the error is insignificant.

I began by saying that this is a story of contrasts. Indeed, we would not be here if there was not a contrasting view of the facts. The facts, the reality of the situation, are not only supported by independent scientific evidence but also by information supplied to the ministry from the Ombudsman.

The ministry can understand how technical the evidence is. We can understand the difficulty the Ombudsman's staff had investigating this issue. It is not a simple fact situation, as was pointed out at the beginning, but they did their best. The geneticist the Ombudsman hired agreed in toto with Dr. Kennedy. We had hoped that that would have ended the matter. However, it did not.

I have the unenviable situation of not speaking to you last. That is the right of my colleague. But I would ask you to remember my submission in your

deliberations, and I would ask you to choose reality over the perception in this case. Thank you very much.

Madam Chairman: Thank you, Mr. Dombek. Before we entertain questions, there was one document which I think we do not have in our binder and we have not been able to locate it. I believe it is the Ombudsman's office that may have it. It is the contract between the complainant and the vendors of the pigs of herd 1. Do you have that? I do not believe we have it in our black binder. If that is something you have or later today you could indicate whether you can supply that to the committee—

Ms. Morrison: In the blue volume at tab 46, towards the back of it, the very last page is the order. "This serves to record our agreement for the supply of...." etc. That may be as close as we come to a contract.

Madam Chairman: There is no other contract. That is what you believe to be—

Ms. Morrison: I think that is an agreement which would be, in law, a contract to buy.

Madam Chairman: There is no signature? Page 2 is just the signature?

Ms. Morrison: I do not know where page 2 is. We could look for that, if you would like.

Madam Chairman: Could you just confirm for the committee if there is a document, just in case it has some conditions or anything attached to it that we should be aware of?

Ms. Morrison: Okay. We have the rest of the pages of that; it has not been anonymized. There is a confirming letter back from the vendor confirming the agreement: "We agree that your letter outlines our arrangement," is essentially what it says. Would you like copies of those anonymized for the committee?

Madam Chairman: Please. That is great. I just forgot to mention that before the break.

Ms. Morrison: Would you like those now?

Madam Chairman: As soon as possible. Maybe the clerk can assist with that.

Okay, I have on my list so far Mrs. LeBourdais, Mr. Farnan and Mr. Charlton.

Mrs. LeBourdais: If I may, just by way of a slight amount of levity for us all this afternoon, I want to read a brief joke from a little book called Tell Me Another!: A New Collection of After-Dinner Stories from the House of Lords and the House of Commons. Perhaps if this method had been used, we would not all be here today. It is from Gerald Howarth, MP.

"Mr. Brown knew none of the facts of life, only the facts of making money. Having done that, he decided to try pigfarming and bought a prize sow. Assured that a mating with the neighbouring farmer's boar, for a modest fee, would produce piglets, he put his sow in a wheelbarrow and rushed her round to the boar.

"To Brown's chagrin, he being a man used to instant results, there were no piglets when he looked next morning. So, deciding that this was no time to quibble over money, he put the sow in the wheelbarrow and hurried her to the local squire's champion boar, paid a higher fee and went home again.

"Next morning, still no piglets.

"So Brown decided to pay the top price for Britain's best boar, who was luckily living nearby. It was into the wheelbarrow again and a very large cheque changed hands for the services of this infallible boar.

"Next morning he rushed to the sow's pen, agog. Alas, no piglets. But the sow was sitting in the wheelbarrow."

I thought that was cute.

I apologize. I have lost a little bit of my documentation. But with regard to your reference to the letter to Dr. Kennedy from Farm Q, dated March 15, where I believe you wished to establish that the criteria the complainant had used in that letter was to mention high health status and pedigree, again you made reference to the point that no back-fat levels, etc., were mentioned. I am just wondering whether perhaps within the farming community there was a knowledge, and I put this out just by way of supposition, that the figures were not always the most accurate and there was a tendency away from using the figures to using other methods. I believe in that letter, and I cannot specifically find it—

Madam Chairman: Page 235 of the black binder.

Mrs. LeBourdais: There is a phrase used in there: "Marketing considerations require that we join the ranks of the pedigree fraternity"—in other words, he is looking to that particular route—"greatly to my regret." I am just wondering if in the past the complainant, perhaps with other farmers, had used the indices system, the ROP system, and was now having to turn to other alternatives because the ROP system was failing him. Could you comment on that?

Mr. Dombek: I cannot comment. I am not the author of that letter of March 15, 1983. Dr. Kennedy received it.

Mrs. LeBourdais: But there were separate suppositions on your part about, "What if this was not mentioned or that was not mentioned," etc.

Mr. Dombek: I am just leading into the answer.

Mrs. LeBourdais: Okay.

Mr. Dombek: Perhaps I have been reading Hansard too much. Anyway, I do not want to put words into the complainant's mouth, but my interpretation of that is that there were no problems with the ROP program. It had been in place since the late 1960s. The Department of Agriculture had been involved in it to a greater extent up until the early 1980s, where it even conducted some testing of technicians and so on. It was a fairly well-known program. It was used across the country. As I said, it is a federal-provincial initiative. There are people on it from all around.

I think the credibility of the program still remains intact. It is a program that, like a lot of government programs, whether they are

federal-provincial or provincially driven, are constantly being reviewed to look at a variety of factors to improve. Nobody is saying that the program was perfect at that time. As a matter of fact, there have been some changes to that program using different estimated breeding values, I believe, which we understand now gives the industry a better indication of how to purchase its animals.

There are these continual improvements, but there was no indication, either in Dr. Fredeen's report or anything that we knew, that said there was some sort of discontent with the record-of-performance program.

1440

Mrs. LeBourdais: Okay. Then if the health status and other factors were all that important as an industry direction on which to judge animals, why is there a necessity? Why is there an ROP index?

Mr. Dombek: It is one criterion of many and it depends on what you want to breed your animals for. Dr. Kennedy or Dr. Pettit can correct me if I am wrong, because I may not know exactly how the industry operates in this regard, but if you have animals that have good back-fat readings and fast growth rates, then you may want to improve that herd by bringing in other factors such as excellent health status, pedigree or something along that line.

The reverse may be true. You may have hogs or swine with excellent health status, but you may want to improve their back fat, so you would use that kind of information in that regard. Is that too simple?

Mrs. LeBourdais: No. You discussed health status and pedigree among British pigs. Do the British have an ROP system or an equivalent?

Mr. Dombek: I will have to pass that on.

Dr. Kennedy: The sources of British pigs that were being considered by the complainant, as I understand it, would have come from one of two breeding companies that would operate independently of any British equivalent to an ROP system. The British, for their pedigreed fraternity or purebred fraternity, do maintain a testing system of sorts that is supervised by the meat and livestock commission. It is not identical to the ROP system but has some similar features.

Mrs. LeBourdais: Would you perhaps assume then that the British farmers, when making their purchases, use that roughly equivalent system in a weighted manner, as Ontario farmers do?

Dr. Kennedy: The structure of the British industry is quite different. The preponderance of sales of breeding stock in the British industry is through breeding companies. The traditional purebred or pedigreed breeder has a very, very small share of the market relative to the situation in Ontario, where pedigreed breeders such as farm 1 have the preponderance of the market. They are different situations. In the United Kingdom, the breeding companies run their own testing programs and do not divulge that information to other people.

Mrs. LeBourdais: Okay. Dr. Kennedy, did you at any time have any discussions with the complainant about the index system, the ROP system?

Dr. Kennedy: Initially, I did. I forget the exact dates, but I

certainly had some correspondence with the complainant and I had a meeting in the presence of Ministry of Agriculture and Food personnel, as well, at the complainant's farm. I believe it would have been in the late autumn of 1984.

Mrs. LeBourdais: Could you share with us a little bit of that discussion?

Dr. Kennedy: The discussion focused at that time primarily around the data from the two programs, the McKee and then the check probes, and the analysis of those data. Indeed, the complainant provided me with that information. I got it first from him and then secondarily from the Ministry of Agriculture and Food, and he provided me with other information on how the pigs were selected.

Mrs. LeBourdais: Were you led to believe at that time that the complainant had put a lot of emphasis on those figures and that perhaps it was the basis for his judgement?

Dr. Kennedy: No, I was not in a position to evaluate that at that time. I was just gathering information. Subsequent to that, I did conduct the study. I forget the date, but it was finally produced in March 1985. If my memory is correct, I met with the complainant in November 1984 and then shortly after the Christmas break started the study. I used input from them as well as input from the ministry to arrive at my report. Then the conclusion of the report was that the probing problems had no serious consequence with respect to selection of the herd and the same thing with respect to selection of the pigs within the herd.

Mrs. LeBourdais: How long have ROP figures been published?

Dr. Kennedy: The program has been in existence since the 1920s. The program in its current form has really been in existence since the late 1960s. Home testing began, I believe, in 1967 for boars and 1969 for gilts and that is the basis of our current program. There have been changes, but they have been evolutionary changes. The major change was made in the late 1960s when the home testing program was instituted; the test station was instituted in the early 1970s.

Mrs. LeBourdais: Have you ever ceased publishing those figures?

Dr. Kennedy: I do not publish the figures. The Ministry of Agriculture and Food does.

Mrs. LeBourdais: Has the ministry ever stopped, for any reason and for any length of time, publishing those figures?

Mr. Dombek: Perhaps Dr. Pettit can answer that.

Dr. Pettit: The figures that are published are in two forms. One is the biweekly reports the ministry provides from the data from our technicians. The other is in the form of official reports that come out from Agriculture Canada from the computer bank in Ottawa.

The biweekly reports were stopped for a period of time during the investigation in the fall of 1984, for a period of about two years. I am not sure of the exact time; maybe a year and a half. We did that for a number of reasons. One was the uncertainty at the time. The other one was the cost of the program and whether it was effective in the field.

Mrs. LeBourdais: Could it not be assumed that the reason for stopping the publication of the data, knowing there were errors, would be because you felt there might be a continuation to mislead other farmers who maybe were also putting substantial weight on the accuracy and importance of those particular figures, in combination with the other factors of selecting their stock?

Dr. Pettit: In the early days, when we were trying to ascertain what actually was happening here and what was going on, yes, we were concerned about that. After that time, as I say, we reinstituted the publication.

Mrs. LeBourdais: There is another area I would like to explore a little. There seems to be a lot of difference of opinion as to the importance and accuracy of the ROP system. Look at volume I, tab 6, the memorandum to Dr. Pettit from Dr. Urquhart, the program manager, with regard to quality control in the swine ROP program. For a system the ministry was claiming was working well, I would just like to pick out a few of the errors that seem to be there. You have said this was a program that was in existence for some 20 years.

In point 1 it is suggested, "A senior technician position is needed," in a sense to oversee the program. Going down to about the middle of that paragraph, "The incumbent would have a reduced level of probing responsibility to permit rotational visits with all other probing technicians." I would assume this was perhaps suggested in order to help alleviate the kinds of errors McKee had run into. It would be spotted more quickly, hopefully.

Dr. Pettit: Yes, this question was asked yesterday. This is a senior technician we put in place who goes to the farm and monitors with the other technicians so that the results can be compared there.

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Mrs. LeBourdais: Point 2 says, "The swine program has expanded to the point that we need a full-time supervisor and assistant to manage it." Then at the end of that particular paragraph it says there was "a new position being created as supervisor."

In paragraph 3 it says: "We are not checking the accuracy of producer scales. Each technician is probing two times as many pigs per year as technicians in Alberta."

Continuing on in section 3, the final paragraph says: "The scheduling is so tight that staff do work extra gratis hours at home in preparing the reports. They have complained that their vacation time has been interrupted due to callbacks. The overall workload is such that staff have not been afforded the opportunity for normal staff development programs within the ministry."

That paragraph concludes, "We should reduce the workload of each technician in such a manner that we can ensure proper delivery of the program by hiring two additional technicians immediately."

The first part of section 4 says: "For at least eight years there has been no formalized basic training of new technicians with outside resources. The training is all on the job and on the farm with other technicians."

The first portion of section 5 says, "The equipment which was originally purchased for this program was of industrial quality and is used in the mining

and structural steel industry to detect flaws." Then a couple of sentences down it says, "We are starting to incur repair costs."

Mr. Dombek: To be fair, I think we should read that second sentence in there, which says, "It does feature an oscilloscope and can be readily tested and calibrated on the farm in front of the farmer."

Mrs. LeBourdais: Yes. If I may continue, in section 7 it says, "The technicians feel that the accuracy of farm scales leaves much to be desired."

My point in going through a number of those is that, at the very least, there is a lot of question as to the viability of this entire program. Even if the particular farmer is just using that as a part of his judgement process, giving as little as perhaps 40 per cent weight to that particular factor in making his judgement call, that 40 per cent has not been very accurate in many ways: the technicians, the equipment, the calibre of the work done.

If I may also read from the handout you gave us, the Ontario ROP Swine Breeders Handbook, where it goes into that section on the ROP swine-testing program in Ontario—if you will just bear with me for a moment here; I have lost the exact part that I was looking for—there is a section here essentially on its mandate, I suppose, or purpose, "To assist Ontario swine breeders in improving their breeding stock by providing performance-testing programs which will effectively evaluate the genetic merit of potential breeding stock." Then it lists the various qualities.

Note that phrase, "will effectively evaluate." Based on the document I have just read you and the series of points with all of the problems of the program, I do not know how you can offer the program to a farmer to effectively evaluate.

Mr. Dombek: Perhaps I could comment based on a couple of things and then Dr. Pettit can.

First of all, I think if we carefully read this memo and do not take parts of it out of context, it does not say the program is not viable. I believe that is the term you used. It suggests that there can be improvements made. There can be improvements made by adding more staff. I think Dr. Pettit would be the first to say that he would still need more staff even at today's date, and perhaps it is something that could be brought up at the ministry's estimates.

The important thing is that government ministries, as you are all aware, are continually evaluating programs, whether it is the red meat program, which is another program that the ministry offers, or one of the financial support programs and so on. We have to do that kind of thing in order to ensure that they keep up with changing times and changing needs.

Prior to this memo being written, this particular program had a major difficulty and it was not with the complainant. What happened was that the federal body, Agriculture Canada, decided to get out of testing of technicians. They did this because their computer system which was monitoring the situation was reprogrammed and they took that out. That left not only Ontario but the other provinces in a bit of a quandary.

It was probably an ideal time, as I think Dr. Pettit said earlier, as things progressed, to have an independent person take a look at it. Ergo, we then have the problem arising with the complainant and we also have a number

of issues raised by Dr. Urquhart to Dr. Pettit. It seemed like a valid time to have Dr. Fredeen come in and do his evaluation of the whole program.

So I just wanted to start that off with an opening remark, particularly the fact that none of these comments in here says it is not a viable program.

Dr. Pettit: I will attempt to answer the questions. As we mentioned yesterday and this morning, the ministry is not saying there were no errors in 1984. That is not what we said. We knew there were problems in the program. I indicated that we did do a staff study during the summer of 1984, and we talked earlier about when technicians were monitored and when we replaced the machine.

The results of those studies and the preliminary work which led to Dr. Fredeen was a report from Dr. Urquhart to me with a number of suggestions that we should be looking at seriously with regard to preventing such occurrences before. As Dr. Kennedy has clearly shown, the error did not compromise the program and it did not play a part in the purchasing situation we are talking about here. These, then, are the suggestions from the program manager of the day, to me as director, for areas that we should develop.

Slightly over a year later, the new pork program, the Ontario pork industry improvement program, came down. That program, among a number of other areas, addressed several of these areas that are mentioned in this memo. When you compare the comments from Dr. Urquhart with the recommendations from Dr. Fredeen's report, you will notice there are similarities in some of the things the ministry should be doing. So if you put it in that context, as a response by the ministry to the study and eventually to the Fredeen work, that is where that fits in.

Mr. Dombek: One other thing I would like to point out is the opening paragraph. What Dr. Urquhart is doing here is reporting on a meeting he had with the professional and technical staff of the swine ROP program. This is in no way an evaluation of any of these matters. In no way is he saying that he agrees with any or all of them. That is basically what the idea was behind this memo.

Dr. Pettit: Suggestions for improvements in programs are always circulating to staff and we are looking at them regularly.

Mrs. LeBourdais: I guess I would suggest to you that I would agree that with any program put out, you are always trying to improve it, etc. I am suggesting to you that, from some of the information I have been given, it is my impression that it was a seriously flawed one; not that it needed improvement—it needed major, major changes. I think the documents you have provided us with attest to that.

Does the ministry provide detailed information—and I mean detailed information—on how to use the data and does it also say what to do, making the assumption that there are errors in the data to start with?

Mr. Dombek: Can you explain what you mean by detailed? How detailed do you mean?

Mrs. LeBourdais: Maybe you could tell me what it does say about how to use that information.

Mr. Dombek: If we go back to the document that Dr. Kennedy provided

and that Mr. Bell and he went over in the listings, where it shows the indexes, identifies the pig, has the columns and so on—the one that was very difficult to read—is that the kind of detail you are talking about?

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Mrs. LeBourdais: I am just wondering, would it make a statement perhaps, "Do not overemphasize the importance of the index in making your final judgement, but rather weigh it as one factor among several, such as conformity, colour or whatever"?

Dr. Pettit: Those suggestions are in the form of fact sheets that are put out by our extension service, and I think some of them are listed in these documents, generally speaking, as we said yesterday, as a guide, the ROP program. Other things you should consider, of course, besides the pedigree and the health status, if that is your interest, are breeder reputation and cost. There are a number of other things that would be suggested in those areas.

To try to answer the first question, we attempt, through the fact sheet system, to provide information on how to and how not to use the data, and that has been listed in some of these documents with the warnings and others.

Mrs. LeBourdais: Again, in the breeders' handbook, on page 3, under the eligibility requirements for the participants in the program, in (4) you ask the participants to "Maintain a complete and accurate breeding herd record."

Dr. Pettit: Yes.

Mrs. LeBourdais: Yet, admittedly, you have not offered them in return complete and accurate information. Could you comment?

Mr. Dombek: The statement is fine on its face. We are talking about human error that occurred in this case. Let's get back to basics again. The ministry has never denied that Mr. McKee made an error. We are concerned about the fact that the error that was made does not have the ramifications that have been stated here today and yesterday.

We are not saying that it is impossible for a farmer not to make an error. That is a possibility too. We are suggesting I think, as anyone, that for good records—I mean, let's be perfectly frank now. Farming is a business. If this industry is going to compete in the era of free trade and so on, we cannot fly by the seat of our pants. That means the ministry and that also means the industry. Accurate records, right from tax records to these types of records, have to be as accurate as possible within the boundaries of the human process.

Dr. Pettit: I might add one statement. Yesterday I was indicating the improvements caused in the area of back fat in the last 15 years by the ROP program in Ontario pigs. If you recall, the figures I quoted were 19 millimetres in 1972 and 12 millimetres in 1987. Although no program is perfect, the program has done a remarkable job in making our pigs among the very best in the world in that area.

We knew there was an error. We found there was an error in the program, and the discussion is, what effect, if any, did that have on this particular situation?

Mrs. LeBourdais: That error having been recognized up front and admitted to, from my understanding, there was no attempt at restitution in any way, but rather a suggestion that although there was an admitted error on the ministry's part, the bulk of the problem was due to management once the pigs were in Farm Q's area of responsibility.

Mr. Dombek: I am not too sure what restitution there would be if there were no damages.

Mrs. LeBourdais: I am not going to get into that part. I am just saying there was no offer of any kind of restitution, even though an error was admitted on your part.

Mr. Dombek: Just a minute. I think this is a very serious point. There are a lot of things that happen on a daily basis that may be caused by an error but do not require restitution. In today's modern world of automobiles, you can drive your car and bump into the back of another car without causing any damage. You would not necessarily suggest, if you were out here on Queen's Park Crescent and you had a minor bump in which there was no damage caused, that you would immediately rush out and offer restitution to someone. You would want to say, "If there is some problem, let's take a look at it."

But what we had here was a situation, when the complainant came to us, where the staff level did a quick analysis of the situation and did not feel that there was a significant problem with this particular complainant and did obtain the services of Dr. Kennedy to look at the specific situation.

So to say, just because there is an error, that right away we all had to offer restitution, I think, is a giant leap. Let me give you another example. I hope Gail does not mind. Maybe she will. But this is technically an assault. Technically, that could be a civil action against me, but what are her damages?

Mrs. LeBourdais: Since many of the pigs were not—My reputation has been sullied.

Mr. Dombek: Sorry, Gail. I am not offering you restitution, either.

Interjection.

Ms. Morrison: That is right.

Mrs. LeBourdais: Since many of the pigs were not able to be sold as breeding stock, however, would you not see that as a damage?

Mr. Dombek: No, because Dr. Kennedy's report indicates that the pigs were able to be sold as breeding stock, and to this day they are able to be sold as breeding stock. That is the key to it.

Mrs. LeBourdais: I would suggest to you that we know that now, but when the farmer, at that point in time, was finding that there were no buyers for his product, it would seem to me it would be of little consolation to him to be unaware of the fact that, two years down the road, the pigs had sorted themselves out and are now of good quality.

Mr. Dombek: The farmer, when he initially came to the ministry, estimated his losses at well over a million dollars, without any justification at all. If we are going to talk damages, we are going to talk damages. I really do not want to get into this. I thought that we were out of it.

Mrs. LeBourdais: Yes.

Madam Chairman: I think we can stop the questioning at that point.

Mrs. LeBourdais: Okay.

Mr. Dombek: I would think that that kind of demand would put the hackles up on anyone.

Mrs. LeBourdais: I do not know the cost of a pig, so I am not going to talk damages. Thank you.

Mr. Farnan: The ministry has accepted all along that there was an error. In my reading of the evidence so far, I think probably they even recognize that, on the part of McKee, there was a significant miscalculation.

Mr. Dombek: No, I have to disagree with that word "significant." There was a miscalculation.

Mr. Farnan: I know you are going to disagree with this, but I would like to get the question out.

Mr. Dombek: Okay, but I have to disagree with you suggesting that the ministry said it was a significant miscalculation. That is not the case.

Mr. Farnan: Okay. I will try again. It would appear, from the evidence that I have heard so far, that there was a significant difference and, from the evidence I have heard so far, that even those involved within the ministry, Dr. Pettit for example, pointed out that changes were introduced when it was realized that the indices were out of line and that, indeed, you were overruled by a consultant who came in after the fact, after you had made certain decisions about the issue. The position had to be re-evaluated.

Maybe you can answer this question for me, because it is fairly relevant, to me anyway. The individual that selected the pigs did not choose the pigs with the highest ROP. This would indicate that the complainant was interested in more than ROP and you gave certain positions. I think that is what I heard the Ombudsman state yesterday, that they were certainly interested in other factors, but that this particular factor, the ROP factor, was, in their mind, a significant factor.

You pointed out that if they were picking the top five, they would have examined only the top eight. Is it possible that the pigs selected, although low in ranking according to the ROP, would all still appear, because of the technician's testing, to be within the superior pig category?

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Then I would go to the analogy you made with regard to the academic comparison. You went on to conclude that in terms of the females chosen, they would be in the bottom 25 per cent of the possible offerings, and in the males it would be in the bottom 40 per cent. This may be true. However, if the owner of Farm Q is looking at a batch of pigs which he believes are all in the top 95 to 100 per cent, which would perhaps be his impression as a result of the testing results that were printed— What I am trying to say is that in your analogy you are saying if the range is from 70 to 100 and he is picking within the 70 range, he is certainly picking at the low end. If on the other hand the testing results appear to indicate that they are all of such a superior

quality, then even those that are picked at the 72 or 93 ranking would be superior quality.

Mr. Dombek: I am glad you asked that question, because you have fallen into the same trap the investigators have. You are in good company, I suppose.

There are a number of statements you made that I think I have to comment on. First, you said the ministry was overruled by a consultant. Perhaps because I am a lawyer I get a little picky about words such as that, but the ministry was not overruled by a consultant; it followed his recommendations. They were recommendations made to improve the program and various aspects of the program, not just the aspect dealing with this particular complaint.

The five out of eight pigs is the experience we have found at the test station. That is run by Agriculture Canada, not by the ministry. You asked if all the pigs would be in the superior pig category. No, not the way the complainant purchased them. I will tell you why. The rankings of all pigs and of all herds are done the same way, and Dr. Kennedy can explain that. The level was not below 25 per cent or below 40 per cent, it was above 25 per cent and above 40 per cent, so it was 75 and 60 per cent; when you set a base level of 25 per cent and above, then almost all of your pigs are going to fall in it and it does not make any difference what herd you go to, because of the ranking system. The ranking system would be the same at farm 1 as it would be at farm 2, as it would be at farm 3, 4 and 5.

You have to understand that the ranking system is the same throughout the province. It is not different just because the individual who did it was a different individual.

Dr. Kennedy: Just to follow up, the proposition you are putting forward is precisely the type of thing the complainant was warned against. What you are suggesting is that if all the pigs in farm 1 were superior quality because of the low reported back-fat probes, that is equivalent to selecting a herd on the basis of the average performance of the herd. Clearly, warnings were made not to do that and no geneticist would recommend doing that and the complainant did have access to have a geneticist. It is just not a reasonable thing to do in selection of pigs, to say, "I have chosen this herd and all the pigs in this herd will be of superior quality." It just does not work that way. Even in the best genetic herds there are some genetically inferior pigs and some genetically superior pigs.

Mr. Farnan: I have just got one other question and I think I am going to have to come back to this particular issue again so that it is clear in my mind before I cast a judgement on this particular issue.

I want to throw out some perceptions that could be floating around and I will admit to those perceptions myself.

Mr. Dombek: Oh, remember what I said about reality.

Mr. Farnan: But I think it is worth you addressing them, because it may be pertinent to the outcome.

I have a problem with credibility at this stage in your bringing forward of experts. For example, what I heard yesterday was that following the discovery of problems with testing—some of which may have been going on prior to the Farm Q incident, but certainly activity was increased, perhaps as a

result of the Q incident, in terms of refining the testing methods and the recognition that testing has significantly improved from the time of 1983—and indeed whatever way you may find problems with the word "overruled," decisions were made following the Q incident which were changed as a result of an additional expert being brought in to look at the situation. The professionals within the field had made certain value judgements that a consultant, in my view, overruled, if in fact what he suggested changed what was happening.

You said, for example, that Dr. Kennedy was working on a paper that would prove that pigs will put on fat when moved to another environment and, in my mind, you stated that as though it was a given fact that this was proved. And with all respect to Dr. Kennedy and his past record, I cannot take it, on the basis of just his record, that he can prove scientifically that such is the case, even if he is working on it now, and even if he has an unsullied and distinguished career behind him.

There is always the potential, as I am sure Dr. Kennedy will be the first to admit, to find opposing viewpoints among academics, and if one was to search around one would probably come up with an academic who could produce an equally researched paper to say that Dr. Kennedy's results do not stand up.

There is the perception of damage control that I think you need to speak to. I think one of the papers that you referred to this morning, which was produced and written by Dr. Kennedy, was a 1985 paper. Again, the question that comes up is: What is the relationship of Dr. Kennedy and Dr. Pettit to the ministry? Who pays their salaries? I do not put this forward in anything but the most positive way in the sense that it is important to know what is the arm's-length distance between Dr. Kennedy and Dr. Pettit and the issue, so that we can look at their statements; or if in fact they are simply an adjunct to the ministry and a ministry involved in a litigation calls its troops to the flag and they respond loyally. Maybe you would like to talk about that kind of situation.

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Mr. Dombek: Most definitely. Would you like me to start?

Mr. Farnan: Please.

Mr. Dombek: You seem to have broken it down into three areas. One is in relation to the experts. You agreed, and I am glad that you agreed, that Dr. Kennedy has an unsullied and distinguished reputation. I believe those were your words.

Mr. Farnan: We could check the record. It appears to me that based on the evidence you have given me—

Mr. Dombek: Good. I will also point out that the ministry has been up front with the investigators in this case all the way through. In fact, when Dr. Kennedy did his reports and there was some difficulty on the investigator's part in understanding the reports, the ministry suggested that the Ombudsman hire an independent consultant, an animal geneticist, to also look at it. This was what they did. In fact, they came to the ministry—and I think Ms. Morrison would verify that we have been fair in this respect—and asked for some names. We gave them the name of Dr. Roger Cue. That is not the initial Q. There is no relation to the complainant Q.

Mr. Bell: There is no relation to Farm Q.

Mr. Dombek: Dr. Cue is well known. He is at Macdonald College. He reviewed Dr. Kennedy's report and he had some questions about it. There was a meeting where the questions were discussed. Dr. Kennedy went to Macdonald College. Macdonald College is at McGill in Montreal. It has no relationship with the Ontario Ministry of Agriculture and Food at all. They agreed. That letter is in the documents here. I referred to that. So we have got the two experts agreeing on the methodology and the results of the report.

As to Dr. Kennedy's paper, first of all, as a result of the decisions made, as a result of the Q incident, I think we have to take it in perspective. It has been said once—it has been said a number of times, I think—that two things were going on at this time. One was the problem with Farm Q and the other was the problem that we saw with a number of other things, staff leaving, the need to hire more staff and so on, that you saw in Dr. Urquhart's memorandum. It was time to evaluate this program.

Agriculture Canada had pulled out of a major part in 1982 and left the provinces high and dry. It was important that the program be evaluated. This is a program that operates with the industry. It has a national advisory board. It is not an OMAF program that we foisted on people. This is something that the industry wanted, and the national advisory board does the policy for this program.

As part of this ongoing process as to how that program was going to operate, along with the problem that resulted from Farm Q—granted that this was one aspect of it, it was not the entire aspect—it was felt it was time for a review. I suggest that it is important for the government and for ministries to continually review programs. If they do not, then we never know whether the taxpayer is getting value for buck or whether the program is successful.

That is where Dr. Fredeen came in and that is where his report came in. His report was started after the incident with Farm Q. His report offered some recommendations and the ministry implemented some of them. I am not sure. Did we implement all of them?

Dr. Pettit: The last one will be implemented on April 3 with the new computer program.

Mr. Dombek: Basically, over a series of years we have been implementing those reports. We did not just go hog wild and say, "Okay, we're going to do everything in the Fredeen thing." I think that is important.

I feel I have to defend Dr. Kennedy here. I know that he will not.

Madam Chairman: I was going to give him an opportunity for that as well.

Mr. Dombek: Dr. Kennedy is employed by the University of Guelph and is paid by the University of Guelph. He has tenure with the University of Guelph. He works with this particular program. He is the technician to the national advisory board.

To say that he is an adjunct of the ministry—certainly there is a close relationship between the University of Guelph and the Ministry of Agriculture and Food; that is well known. A lot of research dollars are passed between the ministry and the University of Guelph. Some may even find their way into Dr. Kennedy's research papers through hiring of students and so on.

That is a normal activity. It has nothing to do with Dr. Kennedy, and Dr. Kennedy has not been paid by the ministry to provide services to analyse and come up with a biased report on that. Again, there has been no suggestion from anyone, from the Ombudsman's staff or anyone, that this is so. We have always pointed out in all our letters that Dr. Kennedy was an independent consultant in this regard.

When you put that together with Dr. Kennedy's agreement with the Ombudsman's consultant, Dr. Cue, I think you have the best credible evidence that you can have. You have something better than Dr. Pettit and me, a mouthpiece coming here and telling you what you should do. You have some scientific evidence that is based on studies that have been done over the years.

Perhaps Dr. Kennedy may want to talk about the study he is doing.

Madam Chairman: Yes, the two things are if you want to respond specifically to the comments of the member and, more important perhaps, on the little young ones that are born, the proof you may have about the first generation of pigs that are born being fat. I think that was somewhere in that question there.

Mr. Farnan: Before the doctor responds, Dr. Kennedy, were you the consultant that was brought in and made the readjustment?

Mr. Dombek: No, that was Dr. Fredeen.

Dr. Kennedy: I was called in subsequent to Dr. Fredeen's work.

Just to recap what was said, I am an employee of the University of Guelph. As part of the terms of my employment, there is a public service commitment. In that capacity, I serve as chairman of the technical advisory committee to the national ROP program, and that is an unpaid position. Again, the usual understanding is that we provide our time free of charge to public bodies. We do make some private consulting arrangements with some private firms.

In that context, it is correct, and in the same context, though, there is a close working relationship, as you are probably all aware, between the Ministry of Agriculture and Food and the University of Guelph. But the employment is strictly at arm's length. I have tenure and I could tell the ministry to take all this and shove it and not affect my terms of employment at all.

Mr. Dombek: I am sure you have thought about it on occasion.

Dr. Kennedy: On occasion on this one I have.

With respect to the study I am undertaking, perhaps your judgement was a little premature in the sense that, just to give the background, we do have data that show that herds in the excellent category are fatter than basic or good herds, but these are data based on long-established herds in the excellent category.

We observed in our own university herd that initially when it was established we had a high degree of fatness and within two years about three millimetres of back fat had been reduced. The same phenomenon occurred in Farm Q's unit 6. Over the first two years there was a reduction of about three millimetres of back fat.

I contacted colleagues in the veterinary college who work with population of new minimal-disease herds and was told that it was common knowledge. I then inquired of them, "Do you have some scientific reports that would substantiate that?" They said no, they knew of nothing in the scientific literature.

At that point I felt there was a need to conduct a study and I have initiated a study using data from seven herds that have recently been established, new minimal-disease herds that have been populated. To be quite frank, there are not sufficient data yet to reach any conclusion.

My hypothesis is that they will be fat, but as any good scientist would say, that is a working hypothesis that will be tested.

1530

Mr. Farnan: That was the point I wanted to make, that in fact what we have is a hypothesis.

Dr. Kennedy: Exactly.

Mr. Farnan: We do not have any scientific evidence at this stage that would support the statement that was made yesterday or this morning.

Dr. Kennedy: Yes. The only scientific evidence we have is that established excellent category herds are approximately one millimetre fatter than basic or good herds, and that has been published in the scientific literature, but we do not have detailed scientific evidence on the process of establishment. In other words, is it initially high and then reduced? I have not been able to find scientific evidence to that effect, and that was the reason for initiating the study.

Mr. Farnan: I certainly appreciate the knowledge that was provided in terms of the process that was followed in bringing Dr. Kennedy on board and his acceptance by the Attorney General, because certainly up to this stage there was no information before me as to what kind of information was going back and forth in terms of the expert witnesses.

The fact that the Attorney General's office had its own expert who consulted with and verified—not verified, but certainly consulted—and I do not know to what extent the accommodations were, but I would certainly be interested in hearing what they were. I think that is very helpful. Thank you very much.

Madam Chairman: Just to correct the record, I think Mr. Farnan was referring to the Ombudsman's office, not the Attorney General's office.

Mr. Farnan: Yes, the Ombudsman's office.

Mr. Charlton: I found our whole statistical discussion today very interesting, having spent a lot of years working with statistics myself in my former life. I have never had a whole lot of use for statistical averages as indicators of very much of anything in terms of evidence. I would like to get a little more specific than we were this morning when we were playing with the chart from two different perspectives. I think perhaps we will need Dr. Pettit to come back up.

Dr. Pettit, you suggested yesterday, and I will just read the quote from

Hansard: "The effects of the index are designed to bell curve them, so they run between 50 and 150. The superior animals—I am talking, at this point, home test—will be between 100 and 150; inferior from 100 to 50. If you are looking, as a breeder, to improve your animals, you are going to want the animals in the top 50 as opposed to the bottom 50. Or if you are a purchaser who has decided on a breeder and you want to buy his or her best animals, you are going to look at the top 50."

You are basically saying that if you are a breeder and you are looking for breeding stock, you are going to be looking over 100 in terms of indexes.

Dr. Pettit: Yes.

Mr. Charlton: I understand from some subsequent discussions I have had since yesterday afternoon that in the case of the gilts, breeders may look somewhat lower than 100. They may go down as far as 85. Essentially, the indexes are used to categorize animals as well as to rank them, to categorize them in a breeder's eyes or for a purchaser who is just looking for stock for the purpose of raising it for slaughter.

Dr. Pettit: Yes.

Mr. Charlton: Okay. Now, my understanding of all the evidence that was presented by the ministry team, as I refer to you all, leads me to believe that in fact the owner of Farm Q and, I guess more specifically, his general manager probably did the selection of the animals they bought as you have been suggesting right from the outset they should, taking into account a whole range of criteria rather than relying solely on the index.

I think that was well pointed out this morning when it was shown they did not purchase just the top index numbers in the categories they were looking at. It is quite likely that those decision were based on a number of factors other than just the indexing in terms of the actual selection of animals. Is that a fair summary?

Dr. Pettit: That is right. That is the point we made.

Mr. Charlton: I think, though, it is also a fair assumption to make, based at least on the numbers that were pointed out to us this morning, specifically in the beige document, tab 143, where we were looking at the numbers that were provided to you, Dr. Pettit, from Dr. Kennedy. We do not have numbers here, I do not think, for all the animals that were purchased, or do we?

Dr. Pettit: These are just the boars. There were studies done on the other side as well, but we did not bring them.

Mr. Charlton: Okay, but all the indications are, for example, that although there is a range of indices on the animals which were purchased, they are all over 100.

Mr. Dombek: Perhaps this question might be better addressed to Dr. Kennedy, because he did this study.

Mr. Charlton: This is not specifically about the study; it is just about the numbers that come out of the data. The data were not part of the study. The data are the ROP data.

Mr. Dombek: If we can read our documents.

Mr. Charlton: Yes. The indication is that all of the boars at least that were purchased were indexed at over 100.

Mr. Dombek: It looks like it.

Mr. Charlton: Do you have any indication that the situation was any different with the rest of the gilts that were purchased?

Dr. Pettit: Dr. Kennedy did a study on the gilts as well. Maybe it would be fair for him—

Dr. Kennedy: The gilts went, I believe, as low as 69 on index.

Mr. Charlton: How many would be that low?

Dr. Kennedy: There was only one below 85.

Mr. Charlton: So of the animals purchased by the general manager and by the owner of Farm Q, all the boars were above 100 and all the gilts except one were above 85. It was a reasonable assumption on the part of the general manager and on the part of the owner of Farm Q that all the animals, save perhaps one, were of breeding-class quality. Is that a reasonable assumption for them to have made?

Mr. Dombek: Dr. Kennedy can explain a little further, but I think this goes into the problem I mentioned, using the Ombudsman's analogy, of picking a team based on—

Mr. Charlton: I did not say—

Mr. Dombek: I know but I think when you choose your index at such a low amount, everybody is going to fit in.

Mr. Charlton: No. I am not getting into the argument about how the owner chose the herd he was going to buy from, because I do not know the answer to that question.

Mr. Dombek: We are talking about the selection of the individual animals in the herd.

Mr. Charlton: That is right. That is where you say to use home index, not anything else, and that is what we are talking about here.

Mr. Dombek: What I am saying is that when you use that, that is the important—

Mr. Charlton: It is home index along with the other factors, though, not home index by itself. It is home index. It is pedigree. It is conformity. It is their health data. It is: How do they look? Do they have a deformity, even though they may genetically be fine?

You are looking at a whole bunch of things, so you do not necessarily in that process just pick the top five, 10, 15 or 20 indexes. You are looking at a number of categories, and it seems to me that is what has happened here. You are looking at a number of criteria, but where the indexes become important, from all the discussion I have heard, from Dr. Pettit's evidence, from the

Ombudsman's evidence, is around this question, are they of breeding quality or not? Is it reasonable that the general manager for Farm Q and the owner for Farm Q, having selected the animals they selected, could reasonably make the assumption that they bought a herd for unit 6 that was, with the exception of perhaps one gilt, all of breeding quality?

1540

Dr. Kennedy: I think what is reasonable to assume is that in the gilt selection, where they had a broader standard on the index, they would be buying a group of animals that would be fairly representative of the average merit of farm 1. On the boar side, if you were to restrict your selection to animals indexing 100 or better, under usual conditions you would be assuming you are buying animals in the top half.

Mr. Charlton: All of his boars were in that category, though?

Dr. Kennedy: The lowest boar was 103.

Mr. Charlton: That is right.

Dr. Kennedy: These pigs were selected over a short period of time. That index is computed on the basis of an average for the year. At the time those pigs were selected, there were proportionally more individuals indexing greater than 100, and that effectively reduced the selection intensity somewhat. That is explained in my first report.

Mr. Charlton: Okay. That is fair. I still do not think you have directly addressed the question I asked, though. Should they have been reasonably comfortable, based on the data they had before them, that the vast majority of the herd they had selected for unit 6 were of breeding quality?

Dr. Kennedy: Perhaps I will phrase it that if I were establishing a breeding herd and I were selecting on index, I would not select the 162nd pig in that herd.

Mr. Charlton: I think we determined, though, that all of the advice the ministry seems to be giving is that you should not be selecting just based on index, that you should be selecting based on a variety of factors. I am saying that I think that is what the general manager did.

Dr. Kennedy: Perhaps I can rephrase that, then. If I were selecting on conformation—or conformity, as it is being described here—and the index, with equal importance, and I were selecting five boars, I would only have to look at 10 boars to do so. I could eliminate five of them in—

Mr. Charlton: All right. That is the way you would have done it. Now back to my question, which is—

Dr. Kennedy: That would be a standard breeding practice.

Mr. Charlton: —that all of the gilts except one were over 85 in terms of their index and all the boars were over 100 in terms of their index. Was it reasonable for them to assume they had purchased a breeding herd, not a slaughter herd?

Dr. Kennedy: On the gilt side, I would think that would be reasonable. You do not have the opportunity for as intense a selection on the

gilt side because of the numbers you require. On the boar side—for example, of the Yorkshire breed they only purchased five—there were 173 indexing above 100 and there would be no need to go that low down the list in terms of a reasonable purchase.

Mr. Charlton: In the submissions the complainant made to the Ombudsman, in the black binder under tab 3, the hand-numbered page 21—

Mr. Dombek: If I could ask Ms. Morrison's indulgence, if we can—

Interjection: Borrow it? Sure.

Mr. Charlton: On that hand-numbered page 21, which is titled table 4, we have a list of indices, for which animals I do not know. They are animals that were purchased, I presume, by Farm Q for unit 6. Since they were in his submission to the Ombudsman's office, I am making that assumption. The first column, I would assume, are Mr. McKee's results. Mr. D is the second prober from the ministry testing the same animals.

I grant you that if you go down two paragraphs further on this page, it says, and it says it as clearly, I guess, as you can say it: "The Mr. D indices are calculated on the Mr. C established base—this might make them look worse in index terms than if indexed on the 'new' base with increased mean and S.D. The fact remains that R.O.P. insisted on retaining the Mr. C. indices at the time of the Farm Q purchase."

What we have here are seven animals that I presume were part of the purchase, seven animals where you have indices created by Mr. McKee, all of which are substantially over 100, and indices which are generated by Mr. D's subsequent intervention with the same animals, and a staggering drop, all except in one case, the last one, where the result is very close: 137 and 139. But the drop in the other cases is staggering.

As I said, the second paragraph past that says that those Mr. D indices probably looked worse than they actually should because they are new measurements calculated on an old base, instead of new measurements calculated on a new base.

One of you, in your presentation, told us earlier that during the fall of 1984 there was actually new data produced on the new base. So presumably you have some figures on these animals that might give us a more accurate reflection of the real numbers, index numbers, on the animals in question, the animals that were purchased by Farm Q for unit 6.

I guess what I am coming to, what I want to know ultimately and, I think, what this committee has to know before it makes its decision, especially since you have suggested we have to make the decision based on reality and not on anything else, is how many of the animals that were purchased by Farm Q and that appeared by the indices generated by Mr. McKee to be of breeding category, fell substantially below that category when the errors were corrected—on individual animals; I am not talking about averages and all the rest of that now. How many animals would the complainant then have had difficulty selling as breeding animals, because he bought them with an index of 145 and he has now got an indice of 34 that he is trying to market?

Mr. Dombek: The answer to your first question is zero.

Mr. Charlton: Zero what?

Mr. Dombek: Zero animals.

Mr. Charlton: That is not what these figures would indicate.

Mr. Dombek: These are wrong because—

Mr. Charlton: Can you provide us with the real figures?

Mr. Dombek: Mr. Charlton, what I told you this morning, when we talked about the chronology—now, we talked about the fact that the subsequent testing did not include any of the pigs that were subsequently shipped or were being shipped at the same time by farm 1 to Farm Q. Secondly, your colleague mentioned credibility. Let's remember where this came from. This is not gospel. I do not know—

Mr. Charlton: I have not asked you to accept this as gospel. I have asked you for the accurate figures, because you have not provided them.

Mr. Dombek: The answer I have been provided with is zero.

Mr. Charlton: You have not provided us with the figures, though; that is what I am asking for. I do not want your comment, that none of them fell below, if you are not prepared to give us the figures.

Mr. Dombek: Well, come on, Mr. Charlton, be fair. You asked me a question. You asked how many animals fell into that category and I said zero.

Mr. Charlton: I asked you, "Have you got the data that will show how many animals did or did not fall below?" Have you got the data?

Dr. Kennedy: Could I answer the question? In a technical sense, the data are not there. To my knowledge, none of the pigs that were shipped from farm 1 to Farm Q were probed twice, so one could not possibly calculate two indices on them. These are the cohort of pigs that were probed while the system was being checked. They were a different lot of pigs.

1550

Mr. Charlton: Could I just stop you for a minute? Did you just say that to the best of your knowledge, none of the pigs that were shipped to Farm Q were probed twice?

Dr. Kennedy: That is correct.

Mr. Charlton: I thought we heard evidence yesterday that they clearly were, in fact probed three times even before they were shipped.

Mr. Dombek: No.

Dr. Kennedy: No. Those were the test pigs when the Ministry of Agriculture and Food suspected an error.

Mr. Charlton: No, this was while the Q pigs were still at farm 1. There were tests done on the farm 1 animals, were there not? Did we not have

evidence yesterday that indicated three sets of tests on a set of test animals at farm 1?

Dr. Kennedy: Yes, you did, but they were not the pigs that were part of the process from Farm Q to farm 1.

Mr. Charlton: They were the tests that indicated the problem?

Dr. Kennedy: That is correct.

Mr. Dombek: But just a minute, Mr. Charlton, let's be fair. You are asking your questions and you were doing a lot of a preamble before that. Evidence that was given to you this morning was that there were 71 new pigs that were tested between July 3 and July 5.

Mr. Charlton: That is right.

Mr. Dombek: They were new pigs; they were not the complainant's pigs. At the same time during the same dates, on July 4 and July 5, 1984, farm 1 was delivering Farm Q's order, so those pigs that were tested by the three technicians were not the pigs that were shipped to the complainant.

Mr. Charlton: You have not listened to everything I said in my question. I said clearly that it was my understanding from your evidence—

Madam Chairman: Mr. Charlton, just settle down. Have you finished your answer based on the first question as you understood it?

Mr. Charlton: Yes.

Madam Chairman: Then if you want to regenerate the question—

Mr. Charlton: He has not understood it so I would like to make it clear to him.

Madam Chairman: I think you have not given him the opportunity to finish. Your question was about seven minutes in length and Mr. Dombek's answer was only three minutes in length. I think you should give him an equal amount of time to respond.

Mr. Charlton: I want them to respond to what I wanted an answer to, though.

Madam Chairman: If they do not, you can ask the question again.

Mr. Charlton: Okay, then we will do it twice.

Mr. Dombek: I am afraid that I am going to have to ask the member to give us his question again, because to be perfectly honest, there was quite a lengthy preamble to it. If he could do that very concisely, I would appreciate it.

Mr. Charlton: We were told in your evidence that because you had discovered the errors that were done through the tests in three days in July, the thing was shut down as of August 23 and there was a new program set up through the fall of 1984 up until the consultant's report. There was new data

produced based on a new base on all of the animals in question, including the ones that were sold to Farm Q.

Mr. Dombek: No, you were not told that. You were right up until the very last five or six words.

Mr. Charlton: So the new data that were produced in the fall did not cover the whole 20 farms we were talking about?

Dr. Pettit: Yes, the data that started in the fall were for all of the farms in that area, including farm 1.

Mr. Charlton: That is right. Now can I continue with my question? The new data that were produced in the fall covered all of the 20 farms and all of the animals that came from those farms, including, I assume, the animals that went to Farm Q.

Dr. Pettit: No, this was several months after the Farm Q deliveries.

Mr. Charlton: They got left out even though you knew those animals were part of the mistake in the first place? You did everybody else but you left out the farm--

Mr. Dombek: Just a minute. I think you asked a question. Can we answer?

Madam Chairman: Yes. I think they are pondering the answer. I think there is a distinction being made here between July 4 and the fall and what was done with Farm Q.

Dr. Pettit: With the staff study that went on in the summer of 1984, our staff at that point concluded there was no compromise in the program. We knew we had made errors, but there was no compromise in the program. Our supervisor of the day suggested we start over with a base in the fall.

As has been, I think, obvious in the discussion here, there were a lot of other situations occurring at the time and we did have an expert in the Dr. Fredeen case come in and look at a whole lot of issues. He made a number of recommendations. One was: "The figures are okay. Roll them in and leave them that way." We had not done that and he had criticized us for that.

Mr. Charlton: That is what happened at the end of the year, right?

Dr. Pettit: That is right, in January.

Mr. Charlton: But what I am talking about is the figures that were produced on the new base during the fall, before the doctor's report, when you changed back and rolled everything in.

Dr. Pettit: They were all corrected.

Mr. Charlton: They were all corrected? Who were they done on?

Mr. Pettit: They were all rolled in right back to the decision date we made.

Mr. Charlton: At the end of the year. But what was put out in September on the new base?

Dr. Pettit: There were no biweeklies being reported in September.

Mr. Charlton: There was nothing being produced at all?

Dr. Pettit: Not by us.

Mr. Charlton: What was the August 23 date you gave us earlier?

Mr. Dombek: The August 23 date was the date the technician was retrained and re-equipped.

Mr. Charlton: But in your testimony this morning or yesterday afternoon you said people were informed that as of August 23—what happened?

Dr. Pettit: We would start a new base for their herds.

Mr. Charlton: All right. Do you have that base?

Dr. Pettit: As I said, we started that base in the fall. That was not being published in the biweeklies and I answered a question over here. We were very concerned at that time about what was going on. My job was to find out what was going on, how serious the problem was. We went through a staff study. We went through a geneticist's report. The slap I took, or we took, with regard to the change we had made was such that I reversed the decision. We went back and rolled those all in. After we were confident, after the Kennedy report and others that there had been no compromise in the program, we reinstituted our biweekly publications again.

Mr. Charlton: When did that actually happen?

Dr. Pettit: I am sorry; I cannot give you the exact date. I could find that out.

Mr. Charlton: Roughly.

Dr. Pettit: It was the next year, 1985 or 1986.

Mr. Charlton: So there was nothing published at all during the fall of 1984? Or was it just for the 20 farms in question that nothing was published?

Dr. Pettit: No, it would be the whole system. To be fair, I cannot answer when it stopped exactly and when we restarted it. I could find that out for you, if you would like.

Mr. Charlton: Let me have one last shot at what I am trying to get at.

Madam Chairman: We just want to clarify one of the responses made to one of your questions. It was mentioned that the pigs delivered to Farm Q were not probed a second time. Mr. Bell would like to discuss that.

Mr. Bell: With reference to volume I of your material, Mr. Dombek or Dr. Pettit, if you would go to tab D, your chronology. I just want to assist as to what I think the situation was. Have you got tab D? The very first item,

August 27. Have you got that? Stick your finger there and flip over to tab 20 of the same volume—

Mr. Dombek: You are asking for dexterity tests now.

Mr. Bell: —which is the complainant's chronology of certain events. I refer to that because there is an explanation given in points 5, 6 and 7 about why McKee was not used for the probing that is referenced, and that Mr. Denniss was co-operative in providing another prober, presumably with other equipment. All right? Are you with me?

Mr. Dombek: Yes.

Mr. Bell: The combination of those two documents seems to establish that on August 7 and August 27, the pigs in Farm Q's herd 6 were probed and that differences were determined between those probing results and the prior existing ones of McKee's.

Dr. Pettit: But keep in mind that farm 6 was not farm 1, and because of the management differences you cannot directly compare results. That is one of the bases of the discussion we have had here. These were probed at the other end, according to the document here, and these look like the Durocs that were bought unprobed originally.

Mr. Charlton: Even item 8 of that same document, the same letter we were just referring to under tab 20, says: "Later it emerged: (a) McKee was on leave when our animals were probed at...." We were led to believe that this was still at farm 1.

1600

Dr. Pettit: But we have indicated earlier that was not true, because the animals had already been delivered on the fourth.

Mr. Bell: They were delivered on July 4.

Dr. Pettit: Right.

Mr. Bell: I take it that what you are saying is that between July 4 and August 7 there would be enough management effect to throw out or to make unreliable an index comparison? That is what you are saying, that Farm Q had the animals for about a month and that is enough of a period of time to make a comparison of different indices impossible?

Dr. Pettit: That is what the program indicates, yes. When probes—well, let Brian answer it.

Dr. Kennedy: To my knowledge, at no time were the same pigs probed in both facilities. Pigs were probed in farm 1 by McKee and went to Farm Q and were not probed. There were some pigs that were not probed in farm 1. They were bred and raised in farm 1, but they were too young to be probed at the time, I believe. They were probed in Farm Q, but at no time was there a set of pigs that was probed in both facilities.

The pigs that were probed twice are the 70-odd pigs that the process started—actually, they were probed three times, I guess. The process started on July 3 and terminated on July 5.

Mr. Bell: Those are not Q's pigs.

Dr. Kennedy: No, they are not Q's pigs, and they are the only ones where we have more than one probe, to my knowledge, on the same pigs.

Mr. Bell: Have you seen this chronology in tab D?

Dr. Kennedy: No, I have not.

Mr. Bell: What that chronology says on the August 27 entry is that there was a telephone call from Q to Urquhart, "Re: high fat measurements on Durocs, August 7 and 27." Those Durocs are from herd 1, that were previously probed. Does that assist you?

Dr. Kennedy: Yes, it does. I have not had any of the data on those pigs.

Mr. Dombek: Perhaps, since this telephone call was to Dr. Urquhart and he is here, this might be a good time to call him.

Madam Chairman: Could you read into the record your full name, please, Dr. Urquhart?

Mr. Dombek: This is Dr. Ron Urquhart of the animal industry branch.

Mr. Bell: Doctor, do you recall that conversation that is referenced in that chronology entry?

Dr. Urquhart: This is a telephone call of August 27, am I reading that correctly?

Mr. Bell: Yes, from Q to you.

Dr. Urquhart: I have no problem with that dating of August 27.

Mr. Bell: Can you confirm for the committee that what you were told during that discussion is that some of the pigs—it says here Durocs—that were purchased from herd 1 had been probed on the dates referenced, i.e., August 7 and August 27, and that there were, it is called here, "probing irregularities"?

Dr. Urquhart: At this time, on August 27 I am comfortable with the fact that there was a telephone call and that it was concerning probing related to Durocs.

Mr. Bell: And the Durocs that were probed on Farm Q were the Durocs that were purchased from herd 1?

Dr. Urquhart: Yes, on unit 6.

Mr. Bell: And those animals, while part of herd 1, had been probed, prior to purchase?

Dr. Urquhart: While as part of herd 1?

Mr. Bell: Yes.

Dr. Urquhart: No.

Mr. Dombek: Or do you mean farm 1?

Mr. Bell: Farm 1. I am getting farms and herds mixed up.

Dr. Urquhart: That they were probed while a part of herd 1?

Mr. Bell: Farm 1.

Dr. Urquhart: Farm 1.

Mr. Bell: Before purchase.

Dr. Urquhart: No.

Mr. Bell: They were never probed? There was no index for any of those animals?

Dr. Urquhart: I cannot confirm that.

Mr. Bell: Is there a problem? I thought we were all in agreement that for the animals that were purchased there were indices in existence. I do not think that is an issue.

Mr. Dombek: I think what Dr. Urquhart is saying is he just does not—I think that is fair.

Mr. Bell: All right. So we had data for all of the animals purchased from farm 1 at the date of purchase? When I say "data," I mean record of performance indices.

Dr. Urquhart: Yes.

Mr. Bell: It seems, from your chronology and from the discussion you had with Q on August 27, that for some of those animals there had been a second probing by your officials and therefore a second set of indices. Can we agree?

Dr. Urquhart: I have no knowledge of a second probing on animals which were sold.

Mr. Bell: Well, this is your ministry's chronology and it talks about it. If you look at your tab 20, albeit it is authored by the complainant, when you look at items 5, 6 and 7 on page 1 there is further information confirming probing and reasons given why McKee was not chosen.

Dr. Urquhart: Okay, can you just give me the question that you would like?

Mr. Bell: Does the data vis-à-vis the probing that occurred on August 7 and 27 for the Durocs still exist?

Dr. Urquhart: I expect that whatever data was generated on any of the probes still exists, if the probing was conducted.

Mr. Bell: And the ministry has it somewhere in its possession, power or control?

Mr. Pettit: We do have sizeable documents here. We are trying to get an answer to your question. I am sorry.

Mr. Charlton: I have an extension to that question that is part of the same question. Were the 71 animals that were probed more than once all from farm 1?

Mr. Dombek: Yes.

Mr. Charlton: All right. Can you provide us with the second set of data and the third set for that matter, if you want, and the indices that would be generated by those second and third sets of tests?

Ms. Morrison: Just to help you—I do not know whether this is what you are looking for, but it appears that it might be—in the ministry documents in volume 2, close to the back—

Mr. Charlton: Volume 2 is orange?

Ms. Morrison: Yes. Just before the last tab is something called "Annexure 'B'," which does appear to be index values from two readers on the same animals. Whether that helps you or not, I do not know. If that is what you are looking for, it is there.

Mr. Chairman: It is at the back?

Ms. Morrison: It is at the very back of the orange volume. It is just in front of the last tab.

Mr. Charlton: They certainly seem to be index values. All 71 animals are not here, but they certainly seem to be comparative index values and they certainly seem to show the same kind of large discrepancy that is reflected in the complainant's submission as well.

Mr. Chairman: It says at the front that these are the July 4 and 5 animals. The animals had already been shipped.

Mr. Bell: This is not helpful, because these are animals that were probed July 4 and 5.

Ms. Morrison: This is the list you have?

Mr. Charlton: That is part of the 71 group then. It was the 71 that were reprobed on July 3, 4 and 5. That is what I am looking for, those 71 animals that were all part of herd 1. Even though they are saying none of them was a Q animal, this is a partial on that.

Mr. Bell: This is not complete.

Mr. Charlton: As I suggested, this small list here in your documentation seems to indicate the same kind of index discrepancy that is reflected in the complainant's submission to us as well. It might be helpful to us to see, as I suggested, the results on all 71 from that herd, so that we

get a sense of whether this was just the exception or the rule in terms of what was found.

1610

Ms. Morrison: Turn back the page.

Mr. Charlton: Is there more, or is this the whole kit and caboodle?

Ms. Morrison: It might be.

Mr. Charlton: This does not include the index, but I guess it gives the fat probes.

Madam Chairman: The ranking.

Mr. Charlton: How do "M" and "L" relate to "A" and "B"? "M" is "A" and "L" is "B"?

Dr. Lee: "M" is McKee.

Mr. Charlton: And "A" is McKee?

Mr. Bell: "M" is "McKee."

Mr. Charlton: But on the next page, then, is "A" McKee?

Dr. Lee: I do not know.

Mr. Charlton: If you used the same letters twice, it would help. Anyway, I think we would like some answers to these questions.

Mr. Dombek: First of all, I think we have found out that these are not OMAF statistics. We have been able to determine that they were not compiled by the ministry, but they came from the complainant.

Mr. Charlton: Where did he get them?

Mr. Dombek: You will have to ask my colleague.

Mr. Charlton: But do not McKee and Lambert both work for the ministry?

Mr. Dombek: That is right.

Madam Chairman: Which statistics were not compiled by you? The first page: appendix A, or appendix B, which is A and B, or both?

Mr. Dombek: Staff tells me neither one.

Madam Chairman: Neither one is—

Mr. Dombek: Annexure A or annexure B.

Madam Chairman: —has been compiled by you?

Mr. Dombek: That is right.

Mr. Bell: By anybody on your behalf?

Mr. Dombek: Not by Dr. Kennedy.

Mr. Bell: Who is Fredeen?

Mr. Pettit: He was the first consultant.

Mr. Bell: Retained by whom? You?

Mr. Pettit: Us.

Mr. Bell: If you look at the paragraph beside "statistics" on the first page, we are surmising perhaps, but it appears that these statistics came out of the Fredeen report. Can you confirm that?

Mr. Pettit: We will have to dig around, I am sorry.

Mr. Bell: That is not part of the material that we have—the Fredeen report?

Mr. Pettit: Yes, it is in here but we will have to check on that.

Mr. Charlton: It might be helpful, too, if ultimately you can confirm that these are accurate figures as calculated by McKee and Lambert on the 71 test animals in question.

Mr. Pettit: We will need some time for that.

Mr. Charlton: I have no more questions until we get some comment on the issues that are outstanding.

Madam Chairman: Will you be able to work on that for us in the next little while?

Mr. Pettit: Yes.

Mr. Carrothers: It may be that my questions end up relating to these statistics or ones like them, but I wanted to get a feel for this. We have had some discussion that obviously the data were incorrect as done by Mr. McKee. What I want to get a feel for is: Was that consistent, since the importance of the statistics is the ranking of pigs or piglets or whatever, one against the other? Were those errors consistent and just off the scale—because you use the analogy of a scale that had an extra five pounds; is it registered—or would the inability to read or the error in reading the ultrasound equipment cause a different ranking to be created? Maybe it relates to these figures as well.

Mr. Dombek: If I do not answer your question, please ask it again, but as far as we can determine, what Mr. McKee was doing was fairly consistent in the way he was reading the machine and so on; he had set up his procedure and so on, and was doing it. So the errors he committed on farm 1 also were found in other farms. I cannot extrapolate how far back that would go, but at least during the period in July, we know he was making mistakes then, or just shortly prior to that.

Mr. Carrothers: It might be helpful if you could explain the nature

of the error he was making. This was ultrasound equipment, was it, that he was reading?

Mr. Dombek: Yes.

Mr. Carrothers: That would mean taking a soft tissue which you put the sound waves through, and getting a reading back of soft tissue. I suppose what you are interpreting is a readout which has different gradations of colour and you are trying to determine from that what you are looking at? Is that how this procedure works?

Dr. Kennedy: On the machine he was using, the readout is a series of lights. The lights are on when they are going through the soft tissue or the fat tissue and they are off when they are not. You read the lights off the scale.

Mr. Carrothers: You do not have to interpret a series of images to determine what you are looking at. Would the misreading be consistent or would it result in making a different mistake on each animal, thereby producing a different ranking of those animals as a result of the error?

Dr. Kennedy: That is a good question. In retrospect, it is impossible to say for certain what the error was. To give a little background, the fat is laid down in layers. There are three layers of fat. If you do not have enough volume or amplitude on the controls, you can read the first two layers of fat. If you do that consistently, that is a perfectly valid procedure for probing pigs. In other words, one can probe the first two layers and that is as good a measure of total fatness of the pig as probing the three layers.

If indeed McKee was doing that consistently, then there was really no problem at all as long as he was consistent in doing that. We have no way of knowing for sure exactly what he was doing.

Ms. Morrison: Excuse me. The ministry's own Dr. Fredeen, in his report, sets out the nature of the errors on page 112 in the black binder. I think you will see from there that there was some information about how consistent the errors were. You will see that the errors were quite different, with a frequency of deviation set out in a table on page 112.

Mr. Carrothers: I guess we do not really have an answer to the question, then. Was it ever really determined what mistake he was making? Could you infer from knowing that mistake what might have happened?

Dr. Kennedy: No. The only thing you can say for certain on the statistics was that he was reading pigs leaner on average than people probing under the prescribed procedures.

If he were just reading the first two layers of fat and doing it consistently, then that would not be a major problem. Indeed, the technical advisory committee is considering changing the standards at this time; it has a proposal from the research scientists in Lacombe, Alberta to change to a two-layer measurement rather than a three-layer measurement. That is an acceptable way of doing things, but it is not the accepted way under the current ROP practices. I do not know whether that makes it clearer or more complicated, but he was clearly not reading the figures as prescribed at that time by the ROP program.

Mr. Carrothers: If we assume, then, that the errors might have produced a completely different ranking of the pigs, just for the sake of discussion—I guess the ministry is indicating it does not think the error was significant. I am just wondering how you could put those two positions together. If the ranking was completely different, would it not have produced a quite different choice of pigs, at least to the extent that data was used to make the choice?

Dr. Kennedy: On the basis of the 70-odd pigs that were probed by the two technicians, the re-ranking was not complete in that sense, that we got a correlation value of 0.53. One would expect a better value, though, for independent probers probing the same layers of back fat, in the neighbourhood of 0.7 to 0.8. A good value would be 0.8.

Mr. Carrothers: There is always a bit of an error factor here, then. What you are saying is that two rankings done by two different people would be out by 20 per cent?

Dr. Kennedy: Yes. You would expect a correlation of 0.8.

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Mr. Carrothers: And on the data that you saw, they were out by 50 per cent between them, Mr. McKee's and Mr. Lambert's?

Dr. Kennedy: That is right. They were out more than you would expect, but not completely out.

Mr. Carrothers: They were out by about twice what you would normally expect between two years of the data. Is that a fair assessment?

Dr. Kennedy: That is a fair way of saying it, that you would normally expect the correlation, say 0.7 to 0.8. We have got a measured correlation of 0.5. That is below what you would expect two probers to correlate at, if they were following the same procedures.

Mr. Carrothers: But you would still feel that, even though the error factor might be as high as 50 per cent, the result of the misreading was not significant in the choice?

Dr. Kennedy: Yes, given the type of selection practised in the herd. Had the selection been for the very top five animals, it would have been more serious, but the more you relax the selection pressure, the less serious that type of re-ranking error becomes.

Mr. Carrothers: So you are saying that position is based on the fact that using the ranking that was available, they did not consistently choose the higher. So that you are assuming, based on that that—tell me if I am putting words in your mouth, but I just want to understand the position—the choice being made was not weighing these indexes very high.

Dr. Kennedy: That is correct.

Mr. Carrothers: So that, therefore, any error was insignificant. That is basically the position you are—

Dr. Kennedy: That is correct, yes.

Mr. Bell: Dr. Kennedy and Mr. Dombek, we have had distributed to us the contract, the exchange of letters, between the parties. Could you just have a look at that? Have you seen it before, sir? Have you seen it before, Dr. Kennedy?

Dr. Kennedy: This was circulated or at least discussed at one of the joint meetings we had with the Ombudsman, at least the second page here. I do not recall whether I read it exactly, but certainly the part of "index of 85 or greater" under 1(a) and "top index boars to be approved by Mr. P. O'Meara" were certainly brought to my attention before.

Mr. Bell: Okay. The document probably reads for itself, but among one of the terms of the agreement, under 1(a) gilts, is an index of 85 or greater. Is that correct?

Dr. Kennedy: Yes.

Mr. Bell: This is the subject matter, the variation of probe results between McKee and others, Lambert, for example. I think, if I understand the material and understand your evidence thus far, that if it is possible to identify a trend, before the problems were discovered in early July, McKee was producing indices higher than the others. Is that a fair comment?

Dr. Kennedy: No, I am not sure what you are saying. Over a period of a year, the indices in a herd will average 100.

Mr. Bell: Sorry. Turn to—

Dr. Kennedy: You keep producing all those indices.

Mr. Bell: Turn to the very first tab, tab 1, in volume I, if you would, sir.

Dr. Kennedy: This is the letter dated August 28?

Mr. Bell: Yes. The second paragraph, sir, records the variation differences between what McKee was doing and what the other technicians were doing. Are you with me?

Dr. Kennedy: Yes.

Mr. Bell: All right. And I can tell you, sir—and the reference is tab 5, later in this book, at page 2—it is recorded from the ministry documentation that variation existed at least between April 1, 1983, and March 31, 1984. So it is a 12-month period of variation; whether that is the outside limit or not is irrelevant.

My question to you, given that variation, would that tend to produce indices from McKee higher than the other technicians?

Dr. Kennedy: No, because all the pigs were probed by McKee in that herd and that variation is part of the formula for calculating the index. The index is designed so that over a period of a year, the average pig is 100 and basically 95 per cent of the pigs will fall between 50 and 150. That is in a sense independent of that variation measure because it is standardized for that variation measure.

Mr. Bell: Let's try it this way. What tab 1 tells us is that in

terms of the back-fat measurements that McKee had done for that period of time, he was measuring those animals leaner than his colleagues.

Dr. Kennedy: Yes.

Mr. Bell: If every other factor in the indices formula remains the same—are you with me?

Dr. Kennedy: Yes.

Mr. Bell: —would he be producing indices higher than his colleagues?

Dr. Kennedy: No, because the index is computed within a herd and the formula subtracts the average of the herd from the pigs' measurement. So if you are measuring consistently high or low, that is subtracted out and the formula divides by this variation factor you have. So if your variation factor is different, that is accounted for.

That is the whole basis for the way that index is designed. Within a herd, over a period of a year, the average will be 100 and 95 per cent will be plus or minus 50. It does not matter who is probing as long as it is the same prober within the herd.

Mr. Bell: Let's try farm 1, then. Let's not spread it over all of the herds and all of the pigs. For farm 1, if the average variation is applicable, then he would have back-fat results which were relatively leaner. Is that correct?

Dr. Kennedy: No. That variation measure is a measure of the spread between measurements within the herd. The average level is the average of those measurements. One is a measure of variability and the other is the measure of the mean.

It is perhaps like saying that when you buy a car, that make of car gives 35 miles to the gallon, if I can use imperial measures, but not all cars give 35 miles to the gallon. Some may give 31 and some may give 39 within that make. The average would be the 35, but there would be a variation that, say, is three, which would be the variability around that average. Those are those two statistics.

Mr. Bell: Let me go at it from this way, then: From your knowledge and experience in this matter, given farm 1 animals and given what you know about McKee's probe results and any reasons therefor that you may know, what effect on the published indices did McKee's readings have?

Dr. Kennedy: The variability readings would have no effect at all because that is adjusted for in the index. An average systematic error, equivalent to hopping on a scale which consistently reads five pounds underweight or five pounds overweight, would have no effect on the index at all, as long as that is consistent. The only thing that would have an effect on the index would be the questions being asked before related to that correlation being less than what we expect it to be. Is that clear?

Mr. Bell: I guess it is as clear as it is going to be.

Dr. Kennedy: In other words, if I weigh everybody in this room and I weigh everybody five pounds heavy and calculate an index on that basis, it is not going to affect the index. You will all rank the same way because that

mean is subtracted to compute the index. But if I weighed you five pounds heavy and you five pounds light, then that will affect the index. That is what I am trying to say.

Mr. Bell: Can we talk about the warnings? Mr. Dombek, you may wish this question answered by Dr. Pettit and/or yourself, but I want to just understand for the committee what the home index values can be used for. Would you turn to page 9 of the program document that you gave to us earlier today, the handbook? Do you have that, sir?

Dr. Pettit: Yes, I do.

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Mr. Bell: I am mindful of Mr. Dombek's comments that you should not take things out of context, but this page is an explanation of how the index works and what it represents in general terms.

Dr. Pettit: Yes.

Mr. Bell: Right. We saw the index 85 in the agreement of the complainant. If we just apply that here, and I guess this was mentioned before, but what it appears the complainant sought in terms of the gilts was a selection from the top 73 per cent of the herd by ranking.

Dr. Pettit: Yes, sir.

Mr. Bell: Right. Then there is a statement that if you select a replacement gilt with an index of 110 or higher, you would be selecting among the top 35 per cent. That is just reading the chart. The last paragraph, though, is, "The home test index is the best single measure of an animal's overall performance and genetic potential as compared to others of the same breed and sex tested in the same herd."

Dr. Pettit: That is right.

Mr. Bell: I take it from that statement that what the home index can be used for is purposes within the same herd.

Dr. Pettit: Yes. There are two purposes that it is used for. One is for the breeder to select and upgrade his own stock.

Mr. Bell: For breeding purposes.

Dr. Pettit: Right. The other one is, once you have decided on a breeder, then you use this information to select the individual animals out of that herd, but you have to use the station test results in order to choose the herd.

Mr. Bell: All right. I want to understand the ministry's position in this case. Is it the ministry's position that the complainant did not use the station test results in the selection of farm 1?

Dr. Pettit: That was indicated yesterday, if I am not mistaken.

Mr. Bell: Did not.

Dr. Pettit: That is right.

Mr. Bell: All right.

Mr. Dombek: We are saying that he either did not or he misused them. It is an alternative argument.

Mr. Bell: By what? By choosing the wrong farm?

Mr. Dombek: I am sorry. Maybe I am—

Mr. Bell: I want to go to farm selection.

Mr. Dombek: Okay, fine.

Mr. Bell: You use farm selection by the station test.

Mr. Dombek: Yes.

Mr. Bell: All right. Does the program say you may only select a farm by the station test method?

Dr. Pettit: It does not say you have to do anything. It suggests that is the way the program should be used.

Mr. Bell: Okay. However the selection of farm 1 was made, I think the ministry's position is it was a pretty good selection.

Dr. Pettit: Right.

Mr. Bell: I have heard you say they are among the best pigs in the province, and that is probably the country.

Dr. Pettit: I go back to the statement I made earlier that breeder reputation and other aspects would also lead the purchaser to a certain group of pigs.

Mr. Bell: All right. Given that, then you flip from the station test to the home test data.

Dr. Pettit: Once you have decided on your breeder, that is correct.

Mr. Bell: You use the home test data if you are acquiring.

Dr. Pettit: That is right.

Mr. Bell: To examine the relative values within the same herd to make your selection.

Dr. Pettit: If in fact you are selecting on the basis of index, that is what you would do.

Mr. Bell: Yes. Hypothetically, if you were selecting on the basis of index—let's use a specific. If you said, "I want to get gilts of an index of 85 or higher within the same herd," there would be nothing wrong with that as a method, would there?

Dr. Pettit: Excuse me for a second. Dr. Kennedy did do a study of what actually happened in this herd with regard to the 85 index.

Mr. Bell: I appreciate that. That is reality. Can I stay just within the hypothetical?

Dr. Pettit: Okay.

Mr. Bell: If the hypothetical was, "I want to purchase from this herd gilts of an index 85 and higher," then the use of the home index data to select those pigs would be appropriate.

Dr. Pettit: It could be dangerous, as in this case, unless you are aware of the entire year's records and results. Okay?

Mr. Bell: What you are saying is that if you are going to use the home test data for that selection, you better make your database broad enough?

Dr. Pettit: Look at everything.

Mr. Bell: All right. Again, if the home test database is broad enough, there is nothing wrong with using it in that way.

Dr. Pettit: Once you get to it, sure.

Mr. Bell: Right. The other purpose for the home test is, once you have acquired control of the herd, you make selection for breeding using the home test index.

Dr. Pettit: Breeding and culling decisions, yes.

Mr. Bell: Let's just talk about breeding for now.

Dr. Pettit: Okay.

Mr. Bell: I do not know, so let's use a hypothetical. If an index is used to make selections for breeding within herd, that would be an appropriate use of the data?

Dr. Pettit: Yes, that is what it is designed to do.

Mr. Bell: All right. Now from what you understand to be what the complainant did with respect to the selection of the pigs within herd using home test data and selection of the pigs for breeding within herd, what did the complainant do under each of those two categories that is prohibited by any of the warnings that you have referred us to?

Dr. Pettit: I am not sure I exactly understand what you are asking me, sir.

Mr. Bell: Well, you have put forward certain warnings, general and specific, which you say the complainant should have had regard to.

Dr. Pettit: Right.

Mr. Bell: From what you understand to be the circumstances of the complainant's use of the home index for initial pig selection and then use of the home index for breeding selection, what did the complainant do under either of those categories that is prohibited by any of the warnings you have referred us to?

Mr. Dombek: The complainant, I understand, indicated to us initially, and I think it was stated yesterday by my colleague, that there were a number of factors it was interested in, okay? Once they saw the statistics for the home test data, and this is what I am saying, they thought they had a genetically superior herd. I believe that was the term that was used. The analogy that I used was that they felt they had maybe come into the Hemlo goldfield of pigs and so they relied on those statistics in choosing the breeder.

Mr. Bell: Is that what you understand to be what they did?

Mr. Dombek: That is what we were told.

Mr. Bell: Okay. And that is, I think clearly by the warnings, not what you do?

Mr. Dombek: Exactly.

Mr. Bell: All right.

Mr. Charlton: We are beyond that now.

Mr. Bell: In so far as what they did once the herd was chosen, what did they do that is not permitted by the warnings or caught by the warnings?

Dr. Pettit: By using the minimum index of 85, which they did, 85, 86, etc. is what they got. Dr. Kennedy's study, which he can comment on much better than I can, indicates that during the year when these animals were purchased the actual—you mentioned the smaller group earlier. In the smaller group of animals that were considered for purchase, the average index was well above 100 at that time so, in effect, their choice of 85 was well below what the 85 is here. That is what leads Dr. Kennedy in his study, and therefore us, to the conclusion that there was essentially no selection, because the cutoff was so low.

Mr. Bell: All right. What warning can you refer us to that covers that?

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Mr. Dombek: If I can just have a moment.

Dr. Pettit: I think in some of the documents that were mentioned yesterday the Ombudsman mentioned that we were suggesting that breeders should publish and use all documents. I think that is the encouragement by the ministry to ensure that people consider all of this documentation.

Mr. Bell: Whether it be now or whether it be before we close off, can you just refer us to what specific warnings you say apply to what you understand the complainant to have done vis-à-vis the 1985 cutoff?

Dr. Pettit: This morning when we were talking about warnings, I think we were referring to the selection of the breeder. That is what the warnings are used for. That is what we were referring to when we were talking warnings, okay?

Mr. Bell: All right.

Dr. Pettit: Now you are asking what happened in this particular case

with regard to the actual purchasing practice, and that is where Dr. Kennedy could comment on what actually happened.

Mr. Dombek: I think, Mr. Bell, the simple answer is that there is nothing specific about how to go out and buy your pigs once you have got into the herd. We do not have a warning that says, "Warning: Make sure you do not pick below X, Y or Z." But it is assumed that you would look at the rolling average over the year and then you would say, "Okay, if the rolling average has an index that is quite high"—say, over 100—"then obviously, in my contract to purchase pigs, I am going to choose a higher minimum index, a higher floor, so that I make sure that as we get into the bell curve issue, the selection of pigs I am getting is a smaller amount."

Mr. Bell: We are now out of the warning category; we are into something else.

Mr. Dombek: That is right. We have never—

Mr. Bell: I want to cover off the warning once for the committee.

Mr. Dombek: All right.

Mr. Bell: What I hear you saying is that your comments vis-à-vis the warnings, both general and specific, relate to herd choice.

Mr. Dombek: That is right.

Mr. Bell: Farm choice.

Dr. Pettit: Use of data, yes.

Mr. Bell: Right, okay. Can I ask you to turn to tab 6 of your material in volume I? I will try to be as quick as I can. Just to give you a background to this, your tab 5, at page 2—

Mr. Dombek: We are at tab 5 now?

Mr. Bell: Yes, I want to give this an introduction. In your tab 5, at page 2, the fourth paragraph from the top, in the last sentence, is the paragraph where Mr. Denniss confirms that the difference between McKee and the others is 0.92 to 2.06 millimetres over the 12-month period.

Mr. Dombek: The variation.

Mr. Bell: Yes. So Denniss or somebody must have had some data to go back to at least as early as April 1, 1983, to make that determination.

Dr. Pettit: Oh, yes. We have all the data.

Mr. Bell: I take it that was part of your summer study or review.

Dr. Pettit: Yes.

Mr. Bell: Now we go to tab 6, and I do not know what the significance of the handwriting, "Meeting date, October 11, 1985," is. But as I understand the chronology, this is obviously October 11, 1984, when this document was prepared. It is also borne out by your chronology in tab D.

Dr. Pettit: It may have been entered later and the wrong year put on it.

Mr. Bell: Okay. In the chronology it is described as an October 11, 1984, document.

Dr. Pettit: Yes.

Mr. Bell: All right. This is Urquhart's submission to you, sir, as a result of a number of things, including the meeting that he references. Right?

Dr. Pettit: Yes.

Mr. Bell: Can we agree that some of the things he is saying in here are that he is serving as a courier between the people with whom he met, the staff, and yourself as to points of view on things that need to be done?

Dr. Pettit: Yes.

Mr. Bell: And on some of the things he is expressing his own opinion?

Mr. Dombek: Perhaps you should ask Dr. Urquhart.

Mr. Bell: Okay, maybe he should come up beside you. Do you recall this document, Dr. Urquhart?

Dr. Urquhart: Yes.

Mr. Bell: Okay. "1. A senior technician position is needed." Prior to writing that document, how long was that view held, either by you or those with whom you met, prior to formulating the document?

Dr. Urquhart: I would expect that this document was constructed subsequent to a staff meeting at which I had input from the program supervisor, Mr. Denniss, and the technicians and our professional staff.

Mr. Bell: How long was the view held by—

Mr. Dombek: Wait a minute. I think that is really unfair.

Mr. Bell: Why is it unfair?

Mr. Dombek: We do not know how long the staff would have held that view.

Mr. Bell: How do you know? He has not told us yet.

Mr. Dombek: I think the question is unfair. How would we know what was in staff members' minds and what date it got in their minds and so on?

Mr. Bell: If the staff told him, then he knows.

Mr. Dombek: They told him and he wrote the memo.

Mr. Bell: Are you going to let this witness answer for himself?

Mr. Dombek: I just want to make sure that the question is fair, because I think if you are asking the witness to speculate what is in the staff's mind—

Mr. Bell: You know I am not doing that. I am asking him if he knows how long the view was held. If he does not know, he can tell me that.

Mr. Dombek: Okay, fine.

Mr. Bell: If he does know, he can tell me.

Do you know, Dr. Urquhart, how long that view was held either by yourself or your staff members prior to the formulation of this document?

Dr. Urquhart: I would think that it would be approximately two to six months.

Mr. Bell: All right. Did that issue contribute in any way to the errors that occurred by McKee in his probing?

Dr. Urquhart: Did that issue contribute?

Mr. Bell: Yes, the need for a senior technician. Did it contribute in any way to what happened with McKee's probes?

Dr. Urquhart: I would think the desire for a senior technician in this capacity grew out of the information that we learned from the McKee probe.

Mr. Bell: Do you have a senior technician now?

Dr. Urquhart: Yes.

Mr. Bell: Did the absence—

Dr. Urquhart: Pardon me, it is not quite that title.

Mr. Bell: All right, I am not worried about titles, the equivalent.

Dr. Pettit: Yes, there is one.

Mr. Bell: We know that whatever McKee did, it was between at least April 1, 1983, and March 31, 1984.

Dr. Urquhart: I am not so sure about that first date.

Mr. Bell: We established it just a few minutes ago.

Did the absence of a senior technician contribute in any way to the deviation that was occurring with respect to McKee's probes?

Dr. Urquhart: Any judgement there would be purely speculation. I do not know.

Mr. Bell: Do you have an opinion?

Dr. Urquhart: The only judgement I can make is that with the senior technician position and the subsequent changes in the program, there has not been a second incident.

Mr. Bell: "2. The...program has expanded to the point that we need a full-time supervisor and assistant to manage it." How long was that view held, if you know, sir, prior to the formulation of this document?

Dr. Urquhart: I would think the same time frame.

Mr. Bell: In your opinion, did that contribute in any way to what happened with respect to McKee's probes?

Dr. Urquhart: Again, that would be speculation. I do not know.

Mr. Bell: Do you have an opinion?

Dr. Urquhart: On that particular one, as far as the assistant is concerned, no, I do not have one.

Mr. Bell: "3. The probing technicians now take shortcuts in delivery of the program. We do not perform routine litter checks. We are not checking the accuracy of producer scales." How long prior to the production of this document were those things going on?

Dr. Urquhart: I would say at least a year.

Mr. Bell: Did those matters in any way contribute to what happened with respect to McKee's probes?

Dr. Urquhart: None whatsoever.

Mr. Bell: Item 4 on the next page: I do not have to ask you the first question because it says, "For at least eight years there has been no formalized basic training of new technicians with outside resources." Did that in any way contribute to what happened with McKee's probes?

Dr. Urquhart: Again, that is a judgement call in that the training and coaching that was carried out at that time and conducted by Mr. Denniss was the best program of any of the ROP programs across the country, so that on this particular day, at that time, it was the best program going. In retrospect, it has now been improved.

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Mr. Bell: Over the page, item 5: "The equipment which was originally purchased for this program was of industrial quality and is used in the mining and structural steel industry to detect flaws." If I understand correctly, for the year in question McKee was using one of those pieces of equipment.

Dr. Urquhart: No, that is incorrect.

Mr. Bell: He was using something purchased subsequently?

Dr. Urquhart: Yes.

Mr. Bell: Was he using the equipment that is described further down in this paragraph?

Dr. Urquhart: It would be the scanoprobe.

Mr. Bell: It says, "In the past few years as additional equipment was needed for the expanding program, we have purchased new designs which have been manufactured specifically for agriculture rather than industry."

Dr. Urquhart: That is correct.

Mr. Bell: Was McKee using one of those?

Dr. Urquhart: Yes, he was.

Mr. Bell: They then talk about the fact that they are cheaper,

something about staff confidence. Is there anything about these points that contributed to the matter of the McKee probes?

Mr. Dombek: In relation to the use of the industrial equipment?

Mr. Bell: No. He did not use industrial equipment.

Mr. Dombek: If Dr. Urquhart could read the whole paragraph, if he could have a moment.

Dr. Urquhart: Mr. McKee was using the scanoprobe which was different from the majority of the other technicians. If he was using the same equipment, there might not have been a variation. I do not know.

Mr. Bell: Was his equipment older?

Dr. Urquhart: No, it was newer.

Mr. Bell: I understand from the material that there was interference in the readings of his machine when he was probing. I have seen the word "interference" as making the readings more difficult.

Dr. Urquhart: I would have to find out more about that and the context in which you use that word.

Mr. Bell: From what you know, have you attributed as one of the causes for the problems to be the equipment he used?

Dr. Urquhart: I believe that was a factor in that he was using equipment which was different, although newer, than the other technicians. It was a factor.

Mr. Bell: Is the other factor human error?

Dr. Urquhart: I think that has to be taken into consideration too.

Mr. Bell: Are there any other factors? We have equipment now and human error. Are there any other factors that you concluded contributed to the circumstances of these McKee indices?

Dr. Urquhart: Not that I can think of, no.

Mr. Bell: Jumping to point 7: "The technicians feel that the accuracy of farm scales leaves much to be desired." How long was that view held prior to the formation of this document?

Dr. Urquhart: I would think at least a year.

Mr. Bell: In your opinion, did that cause or contribute in any way to the McKee index?

Dr. Urquhart: None whatsoever.

Mr. Bell: Has that been corrected?

Dr. Urquhart: I cannot answer that question.

Mr. Bell: Do I understand correctly that if you do not get a correct

weight reading of the animal, you have some difficulties getting an accurate growth value?

Dr. Pettit: I will try to answer that. Maybe Dr. Kennedy will later as well. As long as the animals are all weighed on the same scale and it is therefore relative, that should balance out. Is that what you were asking us?

Mr. Bell: I am not sure how it balances out.

Dr. Pettit: The same scale is used on the premise. It is the producer's scale. Okay?

Mr. Bell: Yes.

Dr. Pettit: The pigs are weighed on that scale—

Mr. Bell: —and if they weigh 20 per cent light, you do not get an accurate reading.

Mr. Dombek: No, but you would still know what their growth rate would be.

Mr. Bell: How would you know that?

Mr. Dombek: If I weigh 150 pounds today because my scale is a little light, and tomorrow or next week on that same scale I notice that I have put on two pounds, I can assume that I put on two pounds.

Mr. Bell: You are presuming a consistency of scale reading, though, are you not?

Mr. Dombek: That is why it is on the same scale. I would expect it to be on the same scale.

Ms. Morrison: But you are not trying to calculate a growth rate.

Mr. Dombek: I would have said that was something, two pounds. But I think that is the point.

Madam Chairman: Dr. Urquhart, you have said that you could not comment on whether the accuracy of the farm scale could have been corrected. Then you passed the microphone, and I do not know if somebody would have been able to answer that question.

Dr. Urquhart: I am no longer associated with that particular program.

Madam Chairman: I just wonder if somebody else knows about point 7, if it has been corrected.

Dr. Pettit: To the best of my knowledge, we have not come out with a mandate that this has to be done or that has to be done. I know the technicians are looking much more closely at scales. There was a time when they carried weights with them just to ensure that the weight was on. I would have to doublecheck that. I think that is still a concern.

Mr. Bell: The last item: One of you indicated earlier that during the material times, the ministry had no knowledge that the breeders were using the ROP home test indices for selecting breeds of pigs until it came out in

the report of your expert, Dr. F. Is that a fair statement of what you told us earlier?

Dr. Pettit: Could you repeat that, please?

Mr. Bell: It is under the "custom of the trade" category. The Ombudsman has said his investigation determined that the industry was using home test indices for the very purpose the complainant put them to, i.e., to select pigs within herds for purchase and then for breeding. The Ombudsman relies upon that, because I believe he argues that that overrides your warning issue. I thought you told us this morning—I made a note of it—that until you got Dr. F's report, the ministry had no knowledge that the indices were being used in that way. Is that a fair statement of what you told us before?

Mr. Dombek: I believe I said that that was the first documented evidence we had of that practice going on.

Mr. Bell: Can we be precise for the record? Are you saying that was the first time the ministry had knowledge that that custom was being exercised in the industry?

Mr. Dombek: It is possible that the custom may have been happening and some word may have been given to technicians and so on. I am not too sure that anyone knew it was an illegitimate practice that was consistently being utilized.

Mr. Bell: Can we hear from Dr. Pettit or Dr. Urquhart? Did they know?

Dr. Pettit: Excuse me. I am trying remember back at the time whether I knew. This was six months after I started on the job. I think at that time I personally did not know of this practice, as best I can recall. To go further possibly, I think the reason for the warnings and the situation in the program would have indicated, from my vantage point, that people in the program, both federally and provincially, were aware of that tendency and therefore put those warnings in there.

Mr. Bell: Other than the warnings, which we have all looked at and talked about, did the ministry take any other steps to discourage the use of the data in that way?

Dr. Pettit: We do also have a field extension service of swine specialists and others. There are presentations made, genetics workshops and other situations, to producers, to breeders and to commercial purchasers. So that would be emphasized.

The other area I alluded to earlier is the number of fact sheets that are produced by the ministry with the information on where and where not to use the information.

Mr. Bell: I understand McKee was a farmer?

1700

Dr. Pettit: Yes.

Mr. Bell: Was he on retainer or contract with the ministry for the services he performed as a prober?

Dr. Pettit: No, he was a full-time civil servant.

Mr. Bell: There is something in the material that says he was a pig farmer.

Dr. Pettit: He is.

Mr. Dombek: There are a number of ministry employees who own farms and farm them either on a part-time basis or in partnership or in a corporation or something like that.

Mr. Bell: Do you know if at all material times he knew what was going on in the industry with respect to the use of the home test data?

Dr. Pettit: I am sorry. I cannot answer that.

Mr. Dombek: I know the time is growing late, but I think I have found where the document Mr. Charlton referred to came from. That is at tab 38, volume II, the orange or dark yellow copy. If you refer back one tab to 39, you will see a letter there to Dr. Switzer, the deputy minister, from the complainant. The very first sentence in the first paragraph says, "As promised I enclose a copy of the minutes of our meeting of 18th January with copies for Dr. Rennie and Mr. George."

Then when you take a look at tab 38, the heading there is "Minutes of meeting held on Friday, February 25th, 1985..." I would think that that may be a bit of a typographical error because of the date of the letter and so on. When you take a good look at the type, except for the annexures, it looks like the same type, but it could be wrong. I think that is where it came from. In other words, the best we can determine at this stage is that those numbers are not from Dr. Fredeen's report but came from the complainant.

Mr. Charlton: What I am interested in, though, is not whether this particular sheet was produced by the complainant, but whether or not you can confirm that the figures here are accurate.

Mr. Dombek: I think we will have to check that out.

Mr. Charlton: That is fine.

Madam Chairman: Do you have any more questions at this point, Mr. Charlton?

Mr. Charlton: No.

Madam Chairman: I had a couple of questions. I saw that deep sigh: "That's not fair. I've waited." I had a question on one that Mr. Charlton asked.

I think Dr. Kennedy answered it, actually. It was with regard to the Farm Q selection from farm 1. I think Mr. Charlton's question went something like: Given that the pigs that were chosen, could Farm Q have reasonably assumed it had a good herd for breeding? Your reply was something like: Given the gilts and how they were calibrated over 85 in all the documents you had, he could have reasonably assumed he had a good herd for breeding.

But when you came to the boars, I got the feeling your answer was that it was less likely from the selection he had that he could assume, when he had

them all there in front of him and started producing, that he had a good breeding herd of boars. Is that right?

Dr. Kennedy: It is close. I think perhaps I should clarify a little. Our conclusion is that the herd from which he purchased his pigs was a genetically good herd, farm 1's herd was good, so if you took a representative sample from that herd, you would have a good breeding herd. That is primarily what occurred in the female selection. It was designed to be a fairly representative sample and to eliminate the very low end, the very inferior animals that would be indexing below 85. That would be a typical practice, I should think.

On the boar end, one might be a little more ambitious. If you got a random sample or a representative sample of farmer 1's herd, you would have a reasonably good breeding herd, because farmer 1's herd was a reasonably good herd. You have the opportunity to go one step further in the boar selection because you need so few boars. For example, they had the opportunity to choose the best five out of 220, so you would have the opportunity to be much more selective. That was the context in which I said that.

They got a representative sample of that herd, but they did not get a superior sample, because in selecting on the index they let in animals that indexed or ranked as low as 162 out of the 220 into the five selected boars, for example, in the Yorkshire breed. That is what I was trying to say.

Madam Chairman: Instead of picking the top five, what I have here is that they picked not numbers 1, 2, 3, 4, 5, 6 or 7; they picked number 8, they picked 72, they picked 93, 140 and, in fact, 162. They picked those five. Would you call that a representative sample generally?

Dr. Kennedy: Yes, that would get close to giving them a sample of pigs that was close to the average of farm 1 and not superior to farm 1.

Madam Chairman: But as an expert, if you were starting up a herd, you might take a representative sample of gilts and say to yourself, "I have a good herd for breeding," but when you came to the boars, to look at it and say, "I have a good herd for breeding," you would not necessarily pick a good representative sample, you would pick a bit better than a representative sample to look at it and say, "This is a good breeding herd."

Dr. Kennedy: Yes.

Madam Chairman: How much more would it have been in terms of representative sample? I gather the top five would have cost the most.

Dr. Kennedy: The recommendation I would make to a breeder who asked my advice would be to select the top indexing boars with perhaps some secondary selection on conformation. In other words, if you want five boars, you would likely find the five boars that were top indexing and met these secondary criteria within, say, the top eight or 10 animals in the herd in terms of indexing.

Madam Chairman: So of the one selection grouping which was made, and it was numbers 9 and 10, you would have picked numbers—

Dr. Kennedy: Maybe numbers 1, 2 or 3, that type of thing.

Madam Chairman: In that ranking?

Dr. Kennedy: In that range, yes. Certainly at the other end, not at the 9 or 10 end. That is doing the opposite. That is selecting the lowest-ranking animals.

Madam Chairman: I find this whole genetic question great, and how much we can guarantee it in these kinds of surroundings. What you are saying is that with these boars, there was more likelihood in the children—is that a good word; can we talk about "children"?

Dr. Kennedy: Offspring.

Madam Chairman: —to have fatter offspring than, of course, if you had a better selection of the boars?

Dr. Kennedy: Oh, yes.

Madam Chairman: That would be the natural assumption.

Dr. Kennedy: Yes.

Madam Chairman: Do you think, given the results you saw out of Farm Q, that was a reasonable herd to have come out of the herd that was selected?

Dr. Kennedy: Given the selection practice, those results were reasonable and to be expected.

Madam Chairman: So even if the ROP data are bang on and you make all this selection, you are never going to be guaranteed a 100 per cent good breeding herd that you are going to be able to sell for breeding? Is there a reasonable assumption that somewhere there you are going to have a certain percentage that may have to be sold for slaughter or that people may not want to purchase because it is the bottom end of your herd?

Dr. Kennedy: Yes, even in the best breeding herd there will be a percentage sold for slaughter.

Madam Chairman: Do you think that in this particular instance, after you looked at all the data, the amount that was sold for slaughter—and I guess there is no agreement that the ones that were sold for slaughter needed to be sold for slaughter—was a reasonable amount that was in the lower end of the scale in terms of potential for breeding, meaning more fat, I presume?

Dr. Kennedy: Yes. I have seen no data on how many pigs or what proportion of pigs were sold for slaughter in Farm Q, so I really cannot comment on that. We do have a reasonably good estimate of the genetic level of that herd after it was established, and there was no genetic impediment, in my opinion, to selling a reasonable proportion of breeding stock from that herd for breeding purposes.

Madam Chairman: I see. You are looking after a year or after two years and all the ones had been culled that were not appropriate for breeding. When those had been culled, you felt that was a good breeding herd that resulted.

1710

Dr. Kennedy: No, even prior to that. In the initial establishment, the pigs that were born in that herd in the latter half of 1984, there was no

genetic impediment to marketing those pigs, or a reasonable proportion of those pigs, as breeding stock. They were genetically not at the top of the tier, but were genetic level for back fat for breeding purposes, keeping in mind that there is a host of other considerations in selling an animal for breeding purposes, growth rate, back fat, health status, etc., as has been indicated.

Madam Chairman: I do not know who would reply to this one, but I am still trying to clarify one thing in my mind. I have other things, but this is one in particular that I am trying to clarify. Have we established that even though McKee's data may have been inaccurate, it was perhaps, or to the best of your knowledge, consistently inaccurate and that his ranking would have been similar to someone else's ranking of the sample?

Dr. Kennedy: Yes, based on the data we have, there would be similarities of ranking. There would be less similarity in ranking than we would have considered ideal, and this was the discussion I went through.

Madam Chairman: Right, but you would not have a situation where he might have ranked a pig as number 100 in the sample and it might have in fact been number 1 or number 200?

Dr. Kennedy: That would be an unusual occurrence. When we calculate these similarities of rankings, we look at the whole list of the pigs. You can sometimes find odd exceptions, but in a selection program you are looking at the average change in ranking.

The importance of that measure depends upon what proportion of the pigs are selected. In the situation of selecting anything 85 or better, the consequences of misranking are rather minimal, and I think all the genetic consultants have agreed on that. Where it could be of more serious consequence is if you are taking the best five out of 200. If you have misranking there, it leads to more serious errors.

Madam Chairman: Is anybody at the bench aware of any pig that was probed by McKee and subsequently that same pig, a reasonable length of time afterwards, was probed by somebody else, part of that being the Farm Q selection?

Ms. Morrison: Not a Farm Q pig.

Madam Chairman: Not a Farm Q. We do not have any comparative documentation between McKee's probing of farm 1 and any subsequent probing of the herd at Farm Q that was the same herd.

Ms. Morrison: I should point out to you that in the synopsis at the beginning of the whole thing, in the agreed upon statement of facts between the ministry and the Ombudsman, there is a statement which says, "The published measurements made pigs from farm 1 appear less fat than they were." There was no quarrel between us and the ministry about the fact that McKee's probes made the pigs appear leaner than they were.

Madam Chairman: That is right. I think we all know you have agreed. I think it was just the difference we are looking at, and it is consistent difference.

Mr. Dombek: Can I tell you why? What I am led to believe is that it would not make any difference even if you did have rankings by McKee at farm 1

and then at Farm Q because of a very important fact, and that is the change in environment and the management thing. We have to keep coming back to that.

Madam Chairman: That is why I said a reasonable length of time.

Mr. Dombek: That is right. It would almost have to be within a few days or so. We do not have that.

Madam Chairman: Okay. What, ideally, I would like, and I am sure all of you would like, is to find two pigs that were probed both by McKee and by someone else and just show that McKee was consistently out by a certain factor. He may have had this scale that was always two pounds out. He might have always been out 0.02 millimetre. I know we have a range in one of these numbers, but I just like the idea. It would make me feel different if he were consistently inaccurate and not just arbitrarily inaccurate.

Ms. Morrison: Can I help a little bit with that? The ministry's report by Dr. Fredeen looked at the errors; it is on page 112 of the black binder. It looked at 58 pigs "probed in common," as it is called, which I think means probed by Mr. McKee and then probed by Mr. Lambert. He then took Mr. Lambert's measurements and subtracted Mr. McKee's measurements and he got the frequency of deviations that are shown on page 112.

It says there were 12 deviations which were zero or negative; there were 29 which were 2 to 10 millimetres; there were 9 which were 12 to 20 millimetres; and there were 8 which were 22 millimetres and greater. So the deviations were all different. Some of them were zero—they were the same—and some of them were as high as 22 millimetres. There was no consistency. That is what the ministry's own consultant found.

Mr. Dombek: I think we can explain that.

Madam Chairman: Good. I would appreciate that.

Dr. Kennedy: First, to be consistent with probes as they are reported, those figures have to be divided by four, because that study, if you look on the page subsequently, is done on the total back fat, which is the total of four measures taken on the pig; these pig probes are reported on the average back fat of the pig, which is the average of the four measures. So those differences do indeed get divided by four.

The appropriate statistic to use to measure the degree of similarity between the probes over and above a constant change is this correlation measure which we have all used in our reports. We are all in agreement, I think, that that correlation was 0.5 or slightly better than 0.5, that that is less than desirable but is not worthless. That is the difficulty of this. It is something that is not ideal but neither is it worthless; it is somewhere in between.

Madam Chairman: So you are saying that even so, he got a good breed.

Dr. Kennedy: Yes. If you take any two probers there will be some of this minor changing and reranking because you are measuring something biological on an animal that moves. You may pick a slightly different spot. The machines may react slightly differently. There is always a margin of error in these probes.

Madam Chairman: That brings me to my next question about the

ultrasound technology. It is always easy for us to look at today, but in 1983 I think it was somewhat less sophisticated than it would be now. It was still very much developing and it has become more of an art now.

I know we are looking at ultrasound technologies and we were talking about the variation that was then and the variation that is now; I believe it was a two-millimetre variation before and now it is a one-millimetre variation. In hindsight, there should have been less liability on the statistics then, or does the variable come into it in 1983?

Dr. Kennedy: No. The technology has improved so that using modern equipment will probably give more consistency or more accurate results. There tends to be a compromise too, though, that the equipment has gotten cheaper. In that sense they say, "We can improve it so much, but they're used to this, so we can put out a slightly less expensive product that perhaps is in between."

I do not know whether Dr. Pettit wants to comment on the equipment. The only involvement I get with the actual equipment is sometimes on the testing aspects and the approval of equipment standards for the technical advisory committee. But certainly the equipment is better now.

Madam Chairman: My last question is in terms of your policy regarding inspectors who do go on to farms. I know you have changed a number of processes in terms of training and mechanics as a result of this and other errors that have occurred. Do you change inspectors now? McKee did this farm all the time. Do you do any checks now to ensure that at some time inspectors or different people do the same animals in a herd for comparison purposes?

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Dr. Pettit: Two things in that regard: With the new pork improvement program we were able to add additional technical help, so there is a little more movement than there was before.

I think the other key issue is the head technician. As I indicated yesterday, we now have two technicians who spend approximately 40 to 50 per cent of their time with the other nine individuals, comparatively doing the testing. That is the attempt on our part to answer your question.

Madam Chairman: The one thing we are satisfied of now is that if McKee did all the probing and there was not anybody else who came in, if he was consistently, in a statistical sense, inaccurate, then at least it was the same person being statistically inconsistent.

Mr. Pettit: Yes, in those days. I cannot say that every day for eight years it was always him, but that was his area and he was there 99-point-whatever per cent. I do not know of any exception.

Mr. MacDonald: I just have one question. It is pretty late in the afternoon. I want to be able to leave this meeting this afternoon— Possibly you can tell me and possibly you cannot, but I get the feeling that under Mr. McKee and the probing he did of the pigs Farm Q bought, he made the wrong reading on that. Is that right?

Mr. Dombek: I am sorry. Who made the wrong reading?

Mr. MacDonald: Mr. McKee. His reading was wrong. Is that right or wrong?

Mr. Dombek: The indexes were wrong. We have always said that.

Mr. MacDonald: Fine. And Farm Q purchased those pigs.

Mr. Dombek: He purchased the pigs with incorrect readings, but the rankings were—

Mr. MacDonald: Just leave it at the incorrect readings.

Mr. Dombek: No, I think that is a little unfair.

Mr. MacDonald: I want to ask the question now, and I do not know who can answer it: Did this financially hurt Farm Q as far as those pigs were concerned? Was he able to sell those pigs or the offspring, which he had purchased to do that?

Mr. Dombek: The ministry does not know.

Dr. Lee: We have information on it.

Mr. Dombek: It has not been shared with us, and we have not addressed that issue.

Mr. MacDonald: I can leave here this afternoon knowing that there was a wrong reading by Mr. McKee as far as the probing was concerned. The ministry made an error.

Mr. Dombek: Sure. We have always said that. We have been upfront with it all the time. I do not think anyone has tried to hide it; they have not tried to hide it from the Ombudsman, they have not tried to hide it from this committee. But let's go back to the analogies I used before: Just because an error was made does not necessarily mean some sort of compensation or whatever has to flow from that. There are a lot of other factors that have to be taken into account. If every time you made an error in your day you had to pay somebody, I think you would find it very difficult to have any savings or anything long in this world. I think that applies to all of us. It certainly would apply to me. If I had to pay my clients for every mistake I made, and lawyers do have liability insurance, I would probably be in some trouble.

Mr. MacDonald: You have answered my question. I leave here knowing there was an error in the ROP test made by McKee, who represented the Ontario government. That is what I am leaving with. That is all I want to know.

Mr. Carrothers: Something came up in the discussions of the gilts and boars. Dr. Kennedy, if I understand correctly, if you are attempting to buy from a herd and get your herd to be a better herd, with the gilts you are buying so many that you are going to get the average performance of the herd, so the whole thing comes down to your choice of boars. Is that right?

Dr. Kennedy: That is primarily correct, yes. The selection of boars will have much more impact on the genetic package you buy than the selection of gilts for that reason, that you need a lot of gilts but you can get by with relatively few boars and you can be much more selective in choosing the boars.

Mr. Carrothers: You can be more selective, but I suppose also that because you are purchasing so few the chance of error is greater, because you are not averaging out.

Dr. Kennedy: Yes, that is correct too.

Mr. Carrothers: If you do that and, let's assume for a minute, do get a superior selection of boars, my understanding of breeding is that there is a bit of art in this anyway; it is not as scientific as all these numbers would like to lead us to believe. What are the chances that you are going to get a better herd? Is it probable? Is it guaranteed? Is it likely? Is it possible? What kind of chance factor enters into this even though you have done the best you can with all these measurements and statistics? Is there still a random chance that gets into this?

Dr. Kennedy: Yes. There is a lottery element. In other words, you can do everything correctly and by the book and, if you select a small number of boars, the chance of maybe getting something better or worse than you think you are getting is there. It increases with a reduction in the number you select. In other words, if you select only one the chance element is much higher; if you select five you reduce the chance element; if you select 10 you reduce it some more.

Mr. Carrothers: And when you breed a low-fat pig to a low-fat pig you hope to get a low-fat offspring but you might not.

Dr. Kennedy: You might not. You are not guaranteed that.

Mr. Carrothers: Even though you have chosen the best possible, because there is just a—I do not know what you call it.

Dr. Kennedy: That is right. That is why some tall parents can have short children and vice versa.

Mr. Carrothers: A wild card.

Dr. Kennedy: Yes. There is a random element to this.

Mr. Carrothers: I suppose you cannot really quantify that.

Dr. Kennedy: I can quantify it, but I hesitate to do so other than to say it exists.

Mr. Carrothers: It would be speculation, probably.

Madam Chairman: I shall assume there are no more questions from the committee of the Ministry of Agriculture and Food at this time. I hated to put us through this, but I wanted to ensure that tomorrow morning at 10 o'clock we will begin with the summation of the Ombudsman's office. Because our time is pressed, with tomorrow being our last sitting day, I wanted to make sure that we either died of exhaustion or that our questions were completed.

I do not know if you can provide it by tomorrow, but if you can have another look at that index that Mr. Charlton has referred to and perhaps give us some insight—

Mr. Dombek: We will try to see if we can find it.

Madam Chairman: —into what exactly that means. We are adjourned now until tomorrow at 10 a.m.

The committee adjourned at 5:27 p.m.

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STANDING COMMITTEE ON THE OMBUDSMAN

CASE OF FARM Q

THURSDAY, MARCH 30, 1989



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Bossy, Maurice L. (Chatham-Kent L)
Carrothers, Douglas A. (Oakville South L)
Charlton, Brian A. (Hamilton Mountain NDP)
Cousens, W. Donald (Markham PC)
Henderson, D. James (Etobicoke-Humber L)
LeBourdais, Linda (Etobicoke West L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitutions:

Cureatz, Sam L. (Durham East PC) for Mr. Pollock
Farnan, Michael (Cambridge NDP) for Mr. Philip
McCague, George R. (Simcoe West PC) for Mr. Cousens

Clerk: Carrozza, Franco

Staff:

Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon
Wilson, Jennifer, Research Officer, Legislative Research Service

Witnesses:

From the Office of the Ombudsman:
Morrison, Gail, Director, Investigations

From the Ministry of Agriculture and Food:
Dombek, Carl F., Director, Legal Services

Individual Presentation:

Kennedy, Dr. Brian, Professor, Department of Animal and Poultry Science,
University of Guelph

STANDING COMMITTEE ON THE OMBUDSMAN

Thursday, March 30, 1989

The committee met at 10:14 a.m. in committee room 2.

CASE OF FARM Q LTD.
(continued)

Madam Chairman: As members will recall, last night we concluded the questioning of the ministry. This morning, I would suggest that the Office of the Ombudsman has an opportunity to sum up and respond to any issues that were brought forward yesterday.

Before we do that, is there anything from the committee you would like to bring up, any issues?

Mr. Bossy: Concerning time, is there any possibility that we could shorten our noonhour break, maybe only take an hour for lunch, so that we could gain an hour in our deliberations?

Madam Chairman: While I recognize that you have travelling and so forth, I have canvassed a number of committee members and they have made luncheon commitments. I am one of those; I have staff leaving and I want an opportunity to say goodbye to them. I have not seen them all week. I see a nod from Mr. Farnan. I could shorten it a bit, but—

Mr. Farnan: No, I agree with you, that we stay with the lunch as it stands.

Madam Chairman: I would normally agree with your suggestion, but I know Mrs. LeBourdais cannot be back until after two o'clock as well. I am a bit reluctant. Unless you can get overwhelming support for your idea, I would be reluctant to do it.

Mr. Bossy: I will just come home three hours later tonight. That is the only difference.

Madam Chairman: I am sorry. I was trying to canvass, because I recognize your problem in travel, but I think it would be unproductive to shorten the lunch break. I am asserting my own personal preference in that decision, I think. Let's see how it progresses; we will be watching the time closely today. While we want all arguments to come forward, we also want to conclude the case today, because I think many of us will benefit from the recent knowledge of the information we have received.

Ms. Morrison, would you like the opportunity to make a few comments? Then I am sure we will have some questions.

Ms. Morrison: Thank you very much for this opportunity. I would like to address a number of points which came up during the ministry's presentation, which I think should be clarified with respect to our position.

The first point I would like to address is the question of "expert" evidence. As you know, this is a very difficult case and we have had expert evidence of the very highest kind to deal with. As was said by the ministry,

we had an expert as well. We had an expert from McGill University to assist us in looking at this documentation, but I have to give the committee a sense of how the Ombudsman can use expert evidence and what the Ombudsman cannot do in terms of expert evidence.

First, the expert we had and Dr. Kennedy did not agree on absolutely every aspect of the case. There were a number of things on which our expert felt he deferred to Dr. Kennedy because he did not feel qualified to make any further discussion of it. One of the matters which was deferred in that way was the significance of the 0.3 millimetres. The expert we had said he was not prepared to go any further on that, because he felt not able to give us any further information, but he wanted it clear that that was not a suggestion with which he agreed in every respect with the ministry's expert.

That notwithstanding, the use of experts altogether is one that is quite difficult for the Ombudsman for this reason. The ministry often has people who know very well about their programs. Dr. Kennedy, for example, is an expert in the record of performance statistics. There is no doubt he is an expert. When we get a complaint from someone and we send the ministry a notice of intent to investigate, if it sends back a report and say, "Our expert says A and that's the last word on it," we are not in a position to say: "Oh, sorry we asked. We didn't really mean to trouble you. If your expert says it's so, it must be so" and go away. If we did that, we would not be fair to the complainant, especially in a case like this, who has his own expertise and his own view of the matter.

The way we have attempted to use experts in this case and in others you have seen, and you have often seen us bring expert evidence to you, is that we feel the expert's opinion, if it is to be given the final word, must be such that a reasonable person could understand it to be a logically well-held view. That is to say, there is no doubt that Dr. Kennedy knows more than the Ombudsman about ROP statistics. On the other hand, the Ombudsman would not be doing his job if, whenever a ministry said, "This is an expert opinion," the Ombudsman threw up his hands and said, "If it's an expert opinion, then I can go no further."

That is not without some qualification. Dr. Lee does have a PhD. A number of people in our office, including myself, have a number of degrees in science as well as in other subjects. It is not as if we are completely unqualified to look at reasonable information.

What we have tried to do in this case is look at the expert's evidence and say, "Does this make sense?" We found a way in which we did not think it made sense. I am going to again go over that with you this morning, because I think it is a place where we feel strongly that we need to make you understand why it was that we came this far in the face of such overwhelming expertise.

1020

Let me just try the diagram again. Here is a line. This line is a line which from here to here goes to increased millimetres of back fat: down here, low back fat; up here, high back fat.

Farm 1, the herd from which Farm Q selected its pigs, had been measured to see how fat it was. It was measured by Mr. McKee. Mr. McKee got a number for the herd average for farm 1. That number we will call A. That is the average for herd 1 as measured by McKee. So far everybody is with me, right?

Farm Q said, "I want to pick some animals from herd 1 and I want to pick animals that are the best animals in herd 1 for back fat." It is, of course, the hope of Farm Q that in looking at all of those numbers and picking the best ones it is going to get a sample of pigs from herd 1 which is thinner than the usual; that is, is going to be thinner than the average of herd 1. Is everybody with me on that?

For example, if the class average was 70, they wanted people who had marks whose average would be above the class average, maybe an average of 85 for the ones they picked. Everyone is with me?

They picked a sample of pigs. If you look at these measurements McKee had done on that sample, the average back-fat measurement on the sample as measured by McKee was B. Why is B below A? B is below A because they were trying to pick pigs that were lower in back fat than the average. This is McKee's average for the herd and this is McKee's average for the sample they picked. So far, fabulous. No problems, right?

Madam Chairman: We have some questions, but I did not know if you wanted to entertain them as we go along.

Ms. Morrison: Sure. No problem.

Madam Chairman: I think we had some from before, but I was going to let you keep going. I think we have—

Mr. Bell: I think it is better if you keep going, but just understand that the heads are shaking because the contract says gilts, for example, that would be chosen from an index of 85 or greater, you have to relate that to—

Ms. Morrison: Let me speak to that just while we are here. This has nothing to do with the contract and nothing to do with anything except this; the pigs which were in the herd and the pigs which were selected from the herd; the actual measurements of McKee of those pigs. It does not matter what they asked for or anything. These are the numbers for those pigs. Okay? McKee had probed the very pigs and the very pigs were listed in those very lists you saw yesterday and the average for the whole herd, the farm 1 herd, was here. Then, there was a selection of pigs; those were selected, as you know, by McKee's figures. If you take McKee's figures for all of the pigs selected, add them up, divide by the number of pigs selected, that is an average for the back-fat figure for those pigs selected. Okay?

What this is like is if we had a class with a 70 per cent average. Some of the class had marks of 80, 90 and 75. If we chose the 80, 90 and 75 selection from the class, those people would have a higher average than the rest of the class if we averaged their marks. That is this. Are you with me?

McKee said, "This is the average for the herd." McKee said, "This is the average for the sample you have picked, Farm Q."

Now if you could turn to page 80 in your black binder, in the middle of the page, there is a sentence which reads, "Selection differentials, defined as the difference between the average of the selected pigs and the herd average, were computed...." This difference is called a selection differential. Is everyone with me? That is just a name for the difference between the herd average and the average of the pigs selected. This is from Dr. Kennedy's original report. Is everybody still with me? Okay.

Now could you go to page 248 of your binder? Just hold on there for a moment. You will know from your synopsis that it has been agreed by the ministry that the real back-fat figures for the pigs probed by McKee were higher than the figures he gave. Everyone has agreed to that. There is no question that McKee's figures for back fat were low.

If you took the pigs and said, "Here are McKee's figures for their average back fat," where would the real figures for the average back fat be? Up here somewhere, because McKee probed low. He thought his figures showed the pigs to be skinnier than they were. So somewhere up here, and we do not know where, is the real herd average. This is McKee's herd average. Up here somewhere at the place we will call B is the real herd average for back fat. Sorry. It is A'. We will stick to what we had before. It is A'. Okay?

This is what McKee said it was. We know it is somewhere above that. We do not know where above it, but we know somewhere above that is the real herd average.

We get someone else to come along and do these readings to find this real herd average, and we also get them to look at the selected pigs. Obviously, if they look at the selected pigs in the same way McKee does, and there is no relation between the reading of McKee and the real reading, then what will happen in the worst-case scenario is that the selected figures—sorry; forget about this with the second reader.

Supposing McKee is choosing the pigs and there is no relation between his readings and the real readings; that is, he is just getting random figures. Then what we would expect is that the selection he would get would be exactly the same as the herd average. Right? If his readings are so wrong that it is just like pulling numbers out of a hat, then what he would end up getting is an average for the sample, which is exactly the same as the average for the herd.

We know it was a little bit better than that; we do not know exactly how much better than that, but we know that if his figures were absolutely random, then the real figures for the selected pigs would be exactly here, exactly the same as A', because he has picked pigs which are neither fatter nor leaner than the average. He has just picked random. The selection of the pigs based on his figures would just be random.

1030

That would make the real selection exactly the same as the real average. We know that the real average is higher than McKee's figures. We therefore know that the selected ones, based on McKee's figures, have to be somewhere near the real average. Certainly, we know that if his readings were random, they would be exactly here; they would be exactly there. We know that figure is fatter than this figure.

Mr. Carrothers: I just wanted to indicate I have a question when she is through explaining the chart.

Ms. Morrison: But we do not know what this distance is. All we know is that the herd was fatter than McKee said it was.

If we used McKee's figures to choose a sample from the herd and McKee's figures were hogwash, we would get a herd sample, a sample we selected, which would be exactly the same as the herd average, because they would have been

random selections. They would be an 85—we are talking now about class marks again, 70 per cent. They would have been an 85, a 55, a 60, a 40, etc., a random selection of people from the class. If you did that, although you thought you were getting the best, your sample that you got would not necessarily be any better than the average for the class in real terms.

Okay. Now, the 0.3 millimetres number that you heard before was this number. You can find that on page 248. But what was the real figure? The problem is we do not know. We know that the herd average was higher than that, but we do not know this figure, because the figures were wrong. So, we do not know what the real herd average was and we therefore cannot, with confidence, say that the only problem was 0.3 millimetres.

Mr. Carrothers: I am having a little trouble understanding, and perhaps you can explain to me, the relevance of talking about what the real level of fat might be versus the comparisons between the sample taken and what McKee measured. It would seem to me that if the point of measuring is to get some sort of ranking within the herd—

Ms. Morrison: I am going to come to rank later. This is just about fat.

Mr. Carrothers: I know it is about fat, but I am just trying to understand why the real level would matter, because it can be accepted that if McKee was not measuring accurately, then the sample would equate to the herd average. That does not need a chart. That is sort of an axiom of mathematics, I guess. So what does A' mean to you? I would have thought our interest might be the comparison between A and B and that A' was sort of a red herring, if I can use that term.

Ms. Morrison: Just a second. Remember that everyone has agreed that McKee's figures were low. So, the real thickness of fat on the herd as a whole is more than McKee had said. Right?

Mr. Carrothers: Yes.

Ms. Morrison: That is A'. That just tells you how fat the pigs really were.

Mr. Carrothers: Yes.

Ms. Morrison: The difference between the sample and what McKee measured, using McKee's figures, does not tell us anything, because these figures were wrong.

Mr. Carrothers: This is where you lose me, because if we are talking about some sort of rating system and ranking system, and we assume different calibrations for a minute and stop using the term "real" versus whatever—why do we not say metric versus inches?—if you have measured them all metric, one against the other, and have something happening, it does not matter what they are in inches, because you are comparing them all within the metric.

Ms. Morrison: That is right, and I am going to get to the ranking in a minute. The ranking is a very important question, because when you start choosing pigs, that ranking comes in. Once you have made your choice, this is just saying: "Supposing I took the ranking any way, supposing what you say is true, what I am looking at here is the actual measurements of the pigs selected." If you looked at McKee's numbers, the pigs that were selected were here. But McKee's numbers were wrong.

As it says on page 248, and I will just run through this—it is a little complicated, but look at this. Dr. Kennedy says, "If" McKee's "figures had no validity at all and were no better than drawing numbers out of a hat"—

Mr. Bell: Where are you on that page?

Ms. Morrison: Page 248 at the bottom of the big, fat paragraph.

"If" McKee's "figures had no validity at all and were no better than drawing numbers out of a hat (which we believe was not the case because there was a correlation of 0.5," which I am going to go into in a minute with Lambert's figures, "...then the actual genetic selection differential against back fat would have been zero." Right? There would not be any difference here.

Remember, this is the real number. If his figures were just like pulling them out of a hat, then his selection average would be exactly the same as the herd average.

Mr. Carrothers: Whatever that is.

Ms. Morrison: What we know about the herd average is that it is thinner than this. We know that. We know it is up here.

Mr. Carrothers: We know it is thinner than what?

Ms. Morrison: Than McKee's average.

Mr. Carrothers: McKee measures thin.

Ms. Morrison: That is right. He says they have only this much back fat. We know, and the ministry agrees, that they had more back fat than he said. So we know this A' is up here somewhere.

As he said, if McKee's sample was no better than pulling them out of the hat, then there would be no difference between the sample and the average. Then the sample would be up here too.

Mr. Carrothers: Yes. But I do not know why you are drawing a comparison between A' and A, because that seems to be drawing a comparison between inches and metres.

Ms. Morrison: No.

Mr. Carrothers: You have gone into a different calibration system.

Ms. Morrison: No, we have not. That goes to rank.

Mr. Carrothers: Maybe I am slow this morning.

Ms. Morrison: I am going to get to that in a minute.

Mr. Carrothers: Jim says I am slow every day.

Mr. Cureatz: No, you are not. I like your line of questioning.

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one pig would be versus another pig within the herd.

Ms. Morrison: I am going to deal with that in a minute. We are going to look at the ranking for the pigs in a minute. Do you want me to do that and come back here?

Mr. Carrothers: Maybe I will come to understand it then.

Mr. Lupusella: How do you reconcile this diagram with the diagram of the experts yesterday that gave you the worst scenario of 0.3? They gave you a worse scenario than this measurement. The presentation which you are making, based on the point which you are presenting before us, is really irrelevant, based on their presentation. How can you reconcile the two?

Ms. Morrison: We are talking about something here that is just reasoning about the figures. We are not necessarily talking about any of the exact things the ministry said.

Mr. Lupusella: You are emphasizing too much the 0.3 figure.

Ms. Morrison: No, I am not emphasizing it.

Mr. Lupusella: The experts gave you a worse scenario than this and they told us that, really, the figure is almost irrelevant.

Ms. Morrison: Okay.

Mr. Carrothers: If the point of this is to say that if McKee's measurements were random, he would get the herd average, I can accept that without a chart. That is sort of a mathematical axiom. Is that what this is intended to show?

Ms. Morrison: Yes. I am also intending to show you that the herd average, everyone agrees, was fatter than McKee's figures, so the selection is going to be fatter.

Mr. Carrothers: Why? There is where you lose me. If we accept that McKee was low, he is measuring low on everything, and you have the A-versus-B thing there and it looks like the sample was leaner than the herd average based on McKee's measurement. Now, if we assume his measurements had no validity at all, then they have chosen the herd average, which would be measured by McKee A.

Ms. Morrison: That is right.

Mr. Carrothers: I am not sure where you take us by talking about the real fat level.

Ms. Morrison: If they were random and used his figures, then there would be no difference here at all. It would just be A.

Mr. Carrothers: Perhaps what we are seeing is that the figures did have some validity. They might not have had much, but they had some.

Ms. Morrison: That is right.

Mr. Carrothers: All you are showing to me, that I can take out of this, is that the sample was a little leaner than the herd, despite the fact that McKee—

Ms. Morrison: That is right. It was a little leaner than McKee's values, but McKee's values were too lean. McKee's average value was here; the herd's real average value was fatter than that.

Mr. Carrothers: But is not the selection being made to get pigs that are leaner than the herd?

Ms. Morrison: That is right.

Mr. Carrothers: It would seem that to some extent it was accomplished. To talk about whether McKee's measurements were real or not, I am just wondering where that logic leads us.

Ms. Morrison: That is the point of the case.

Mr. Carrothers: It is the ranking of pigs against each other that is important, not what their real fat level might be.

1040

Mr. Farnan: I do not know if this clarifies this, but is there room for a B' which says the real average of the sample should be somewhere below A'?

Ms. Morrison: It should be, sure.

Mr. Carrothers: So we end up with a B' that is 0.3 millimetres below the A'.

Mr. Charlton: You do not know that.

Ms. Morrison: It is certainly higher than B.

Mr. Farnan: We are not sure.

Mr. Charlton: That is the point. You do not know that. It could actually be higher than A'.

Madam Chairman: Perhaps you will hear the explanation from Ms. Morrison since she is trying to make the point.

Mr. Farnan: I think we are having difficulty and we are trying to come to terms with it.

Ms. Morrison: Let's talk a little bit about ranking because maybe that is causing a problem. I think one of the problems is, of course, that if you measure them in inches and then in millimetres and all the numbers were in the same order, you would not have a problem. Could you look in the ministry's orange book and can you look at the second-last page of the book?

Mr. Carrothers: Is that tab 39?

Ms. Morrison: No, two pages before tab 39.

Madam Chairman: Is that the index?

Ms. Morrison: It is called annexure A.

Madam Chairman: Before you get into annexure A, I think it is important that we clarify what annexure A is because there was a lot of discrepancy. Is the ministry in a position to do that?

I think before you start, Ms. Morrison, that is something that was the whole crux of the question yesterday—where those figures came from. If you will permit, I would like to find out where they are from. I know Mr. Charlton is waiting with bated breath for this information.

Mr. Carrothers: I hope he has not been holding it all night.

Madam Chairman: I believe he has.

Mr. Dombek: There are two tabs that we really have to look at, tabs 38 and 39. Tab 38 is the minutes of the meeting that was held at the complainant's residence. As you can see under the heading "Statistics," these are the notes that were made by the complainant and sent to the ministry. What does tab 38 show us?

(a) Perhaps a few words of caution about these figures. Annex A, which is at that tab, is information supplied by the complainant from information given to them by farm 1.

(b) None, and I repeat, none of these figures represents any of the pigs purchased by the complainant. They are the approximately 70 pigs probed by both McKee and Lambert as part of the ministry's study.

(c) All annex A shows is that there is approximately a 2.2-millimetre error that Mr. McKee made. Remember, the ministry has always said that we made this error.

(d) We cannot assume that Lambert's probes were completely correct. There is probably some margin for error in his probes. Remember, yesterday we talked about a normal correlation between probers of 0.7 or 0.8. Also remember that the actual correlation between Lambert and McKee is 0.53, not zero.

(e) All annex A shows is the difference in back-fat probes. It does not show the actual rankings used by the complainant when he selected his pigs because he used the index, which is a figure comprised of both back fat and growth rate. Therefore, it was still the purchasing practices of the complainant that created his problem. Also remember that there were not two sets of figures being bandied about when the complainant purchased his pigs. Lambert's figures were not official. They were part of the ministry's internal check.

So the issue is not that an error was made. Really the question is, "So what?" May I remind you that Dr. Kennedy and Dr. Fredeen, in both their reports, agreed that the answer to "So what?" is insignificant, if there is any effect at all. And Dr. Roger Cue, for the Ombudsman, agreed that if the cutoff level was low, as in this case, rankings would have little effect.

Turning now to annex B, which follows annex A, this is a table compiled by the complainant himself. It is statistically inaccurate. It compares apples to oranges because column A uses as its base figure only—and I repeat only—the probes done by Mr. McKee. Column B, on the other hand, uses a mixture of the probes of both McKee and Lambert.

Dr. Kennedy recomputed these figures using the proper base for column B;

that is, column B was recomputed using only Lambert's probes. Once that was done, Dr. Kennedy's study found that the results were very similar and did not have the wide variation as you see in annex B.

Once again, this committee has the evidence of the three Canadian geneticists before them—Fredeen, Kennedy and Cue—and all agree that the error was not significant in the end result. Rhetorically, I have to ask you at this stage, what more can be said? Remember the issue has never been that an error was made; the issue has been what the result of that was.

We believe that you have had sufficient evidence on the practices of the complainant, as evidenced by his contract and his purchasing procedures, to show that he was the author of his misfortune in this regard.

Madam Chairman: Before I entertain your questions, and you are first, Mr. Charlton, I would just perhaps like to give Ms. Morrison a chance to respond to the comment that these were supplied by the complainant and so forth; just a response in that area and then Mr. Charlton does have a question.

Ms. Morrison: If you go back in Hansard even five minutes now, you will see that Mr. Dombek has agreed that these are figures of pigs at farm 1 which were probed by both Lambert and McKee. He said that he agreed with it. There is no question what the figures are.

Madam Chairman: On annex A?

Ms. Morrison: On annexure A. The fact that the complainant may have typed the figures on to this page is not a problem because the figures were taken from farm 1 probes by McKee and Lambert. Mr. Dombek has just agreed to that, so we know what they are.

Madam Chairman: But then annex B—

Ms. Morrison: I do not care about annex B. Do not bother about annex B.

Madam Chairman: We are not looking at annex B at all because—

Mr. Charlton: I have a question.

Madam Chairman: Do you have a question about annex B? I think I would appreciate a clarification. If Mr. Charlton is going to look at annex B and the numbers that you thought were inconsistent, I would like your position on what annex B is.

Mr. Charlton: My question about annex B is very simple. We have just been told that the numbers in column B have been recalculated as consistent figures all on the same base, as opposed to mixing bases. Can we please have those numbers?

Mr. Dombek: You do. It is in Dr. Kennedy's study.

Mr. Charlton: These animals here are not identified. From the other material we have, I do not know how to put numbers to this list here. You may have some way of identifying the animals that are shown on annexure B, but there is nothing on annexure B itself to identify the animals. Therefore, I do not know what to look at.

Mr. Dombek: I cannot take responsibility for annexure B and neither can the ministry.

Mr. Charlton: No, but you told us these figures had been recalculated.

Mr. Dombek: That is right.

Mr. Charlton: So you must know which animals these are if you know they have been recalculated.

Dr. Kennedy: Do you want me to clarify that?

Mr. Dombek: Sure. Could we have the microphone for Dr. Kennedy to show you how the recalculation was done?

Dr. Kennedy: Some time ago, early on in the investigation—I just pulled out my notes from it—I recalculated the indexes of the whole group of pigs, not just the six or seven listed there. I recalculated the indexes of the whole group using McKee's probes with McKee's base and Lambert's probes with Lambert's base.

I cannot identify these six or seven individuals totally, but what I did was I said: "Let's look at pigs that index over 100 on McKee because that was consistent with the selection practice, at least in the males. What is the average index based on McKee's probes and what is the average index based on Lambert's probes?" I got 119.7 from McKee and 109.6, which would be numbers considerably larger than those listed under column B of annex B.

They fell in a similar range, with Lambert's indexes being slightly lower than McKee's range from 100 to 144, because 100 was the cutoff point. Lambert's ranged from 83 to 132, but most of those indexes were above 100. I felt that was the relevant thing to compute. If these pigs were identified, I could go through and do them.

1050

Mr. Charlton: The reason why I am concerned about the individual pigs is very simple. It is an issue that I raised yesterday, and it is an issue that I am raising again today. Statistical averages are one thing, and I do not dispute, for example, the evidence which you have given here that on statistical averages, the errors that were made, made no significant difference to the overall program. I understand that. I understand how statistics work.

Because the statistical averages were significantly the same, that does not mean that individual pigs which were purchased by the owner of Farm Q were not statistically way out on a limb, and therefore altered in value as per what he paid for them. That is what we have to decide here.

Mr. Dombek has been adept at using analogies, and I will give you one on a statistical study I worked on a number of years ago when the provincial Ministry of Revenue went to the city of Hamilton trying to sell them a market value assessment package. They said to the city council: "Look, for very little pain, we can correct a lot of inequities in the system. Here is what you will get. Some properties will go up, some properties will go down in terms of assessed value. Statistically, the average increase will be between six and seven per cent, and the average decrease will be between three and four per cent."

Those statistical averages were correct. What they did not tell the politicians was that the highest increase was 5,000 per cent. That is the point I am making: If we as a committee do not have the specific data on what can happen to an individual pig, we cannot answer the question about whether or not this farmer lost money as a result of using McKee's data to make his selections.

Dr. Kennedy: I can answer that analogy exactly, then, with the data I use. It is clear that for the boars, the index specified was 100 or better—at least 103 was the lower one. If they selected pigs indexing 100 on McKee's figures, the lowest index, which is your range of 5,000 per cent, was 83 on Lambert's.

Mr. Charlton: On Lambert's?

Dr. Kennedy: Yes.

Mr. Charlton: And 83 for a boar that was over 100?

Dr. Kennedy: For a boar that might have been 100. That is the extreme that you are talking about in your analogy to 5,000 per cent.

Mr. Charlton: Well, that is the point I am making, though.

Dr. Kennedy: So I can answer that exactly, and the average was 10 points.

Mr. Charlton: The average was 10 points, but you are saying, of the boars that the owner of Farm Q bought, the lowest of which on McKee's rating—

Mr. Dombek: No, he did not say the boars which he bought.

Dr. Kennedy: These are the animals on which we have joint testing between Lambert and McKee. That is the only database we have for comparison between Lambert and McKee. But I want to re-emphasize a point that was brought out: Lambert is not 100 per cent correct. There is a margin of error in any probes, but we assume that Lambert was probing—

Mr. Charlton: Yes, but we have to try to assess here the potential for shift.

Madam Chairman: Mr. Charlton, can I just ask you a question? I have some concern that, although I know you wanted to pursue this line of questioning, it is the Ombudsman's time to sum up, and I feel that we are getting off. Can you wait for these final questions when we sum up in toto?

Ms. Morrison: I just want to drop the question of correlation.

There were a number of times yesterday when people asked about correlation, particularly Mr. Carrothers. Instead, if the ranking of the pigs was the same with the new data as with the old, then the mistake makes no difference. I absolutely agree with that statement. If we are just measuring them all up here instead of all down here and we are picking them by rank, you are right, it would not make any difference.

But I want you to look at two things. First of all, I want you to look at what the idea of correlation is when you are talking about rank. If I have the numbers ranked like this, 1, 2, 3, 4, 5, and I have another set of ranks,

which goes 5, 2, 3, 1, 4, there is a high correlation between those figures, because two fifths of them are the same. So there is a correlation between those rankings, although the top ones are absolutely wrong.

Now have a look at annexure A. Annexure A is the comparisons between the probes of Lambert and McKee. On the right-hand side, the very far right-hand column is the ranks of the pigs which were measured by each. The far right-hand column labelled L is the ranks for Lambert and the column labelled M on the right is the rankings for McKee.

McKee ranked as number 1 a pig which Lambert ranked as 15—well, not bad. McKee ranked as 2 a pig Lambert thought—now remember, Lambert is the one who is correcting things here—was a 41. Just keep going. McKee ranked as number 7 one that Lambert found to be 37; as number 9 one that Lambert found to be 52.

Does that answer your question, Mr. Carrothers, about whether the rankings were affected?

Mr. Carrothers: Well, it does. We have been told there was approximately a 50 per cent correlation. Knowing a bit about statistics but having forgotten most of it, I think there is a little more sophisticated comparison of the numbers to come up with that.

Ms. Morrison: Shall I show you what a 50 per cent correlation of rankings looks like exactly? It would look like this. I have some figures here that would help me, I think.

Suppose I have rankings 1, 2, 4, 5, 6 and 8; then I have rankings 10, 8, 4, 5, 6 and 1. The correlation between those two sets of rankings is 50 per cent because these numbers are the same. But if I picked this one, saying I want the best pig, and these are McKee's figures, I got the worst pig, even though some of the figures were the same.

It wasn't just as if we had McKee's figures down here, 1, 2, 3, 4, 5, 6, and Lambert's figures up here, 1, 2, 3, 4, 5, 6, but numbers were jumbled, so the rankings were mixed up. There is no question that this is true. Dr. Kennedy has said it in his report. There have been a number of places where I pointed out the first day, and it was agreed by the ministry, that the pigs were misranked because of the error.

Mr. Carrothers: If the point you are making is that this all seems to come down to a choice of the five boars and that is a very small sample and any miscorrelation between the indices is going to have perhaps a greater impact on that small sample than the other sample, that is a given. I understand that.

Ms. Morrison: No, I am just saying that it was not just a matter of measuring them all a little bit fat or all a little bit lean; they were mixed up.

Mr. Carrothers: I understand that, yes.

Ms. Morrison: Now I am going to go back very briefly to this for one more quick shot. The reason we care about the actual figures is that Dr. Kennedy cared about the actual figures. At page 248, which I think I gave to you, the sentence I read before says, "If McKee's figures had no validity at all and were no better than drawing numbers out of a hat (which we believe was not the case because there was"—as much correlation as I showed a minute

ago—"the actual"—the word is his, not mine—"genetic selection differential against back fat would have been zero."

This is what they expected. This is the expected genetic merit based on McKee's figures. They expected to get not only a herd this good but a sample even better than the herd. We know that the herd was not this good. The herd was only this good, and we do not know what this is, but we know it was up here somewhere.

1100

If McKee's figures were completely random, then the sample would also be here. The actual sample would also have a back-fat figure. This figure, which tells us how much better the sample was from the herd using McKee's figures, is useless to us because McKee's figures were wrong. McKee's figures were this much back fat for the whole herd, this much for the sample; but his figures were wrong. They were not only wrong, i.e., wrong in absolute value; it is not only that he said five when it was 10 and 15 when it was 20, etc.; he said five when it was 10 sometimes and 10 when it was five sometimes. So we know the real herd average was somewhat fatter than McKee's average and we know the selection differential was not 0.3.

Mr. Bell: I am going to invite one person in this room to nod or shake their head. That 0.3 is distracting.

Ms. Morrison: Okay, take it out.

Mr. Bell: No, let's put it where it should be. If I understand Dr. Kennedy correctly in this paragraph, he is saying, "If you assume absolute correctness or you assume absolute inaccuracy, the difference will be 0.3 millimetres," which means on your chart you put a bracket between B and B' and you put 0.3 per cent on it.

Ms. Morrison: Between here and here?

Mr. Bell: Yes. What he is saying is that if you assume---

Ms. Morrison: No.

Mr. Farnan: A' and B'.

Mr. Bell: Go to the two extremes. If he is absolutely correct or if he is absolutely wrong, the difference on the average of samples selected will be 0.3 millimetres.

Ms. Morrison: No.

Mr. Bell: All right, you say no.

Ms. Morrison: I went to page 80 and I said what the selection differential was. The selection differential on page 80 is carefully defined as the difference between the sample average on McKee's figures and the herd average. That is the selection differential; that is the 0.3. It is the difference between the average on McKee's figures of the sample and the herd average. I am sure Dr. Kennedy does not disagree with me.

Mr. Bell: Read his last sentence then on page 248, in that paragraph, and you tell me what you say it means.

Ms. Morrison: The expected genetic merit of the pigs was 0.3. There is no quarrel about that. Unfortunately, the expected genetic merit was based on McKee's figures. I have no quarrel with that. The expected genetic merit was the difference between the sample and McKee's figures and the herd and McKee's figures. That is what Dr. Kennedy says it was, and that is what he says here: the difference between the expected genetic merit and the expected genetic merit—he is not talking about actual differences and I am.

I have no quarrel with the fact that on McKee's figures it looked as if they got a sample that was 0.3 millimetres better than the herd. There is no question about that, but McKee's figures were wrong. We are not talking about McKee's figures, we are talking about real figures and we all know the real figures were higher than the expected ones. I think there is no point in going over it.

They got something here. There is no doubt they got something from a herd whose real herd average was here, and they expected something down here.

Mr. Carrothers: The addition of the B' made that clear to me. It still seems to me that the implication of all this is that the difference between A' and B' is 0.3 millimetres, just as the difference between A and B is 0.3 millimetres, statistical average. I do not know how you start comparing A' with A. I am still confused about that.

Ms. Morrison: We cannot compare A' with A, because we do not know how much fatter. We just know they were fatter; we do not know how much fatter they were.

Mr. Carrothers: But is not the point of all this the difference in fat levels between the pigs chosen and the herd, which is 0.3 millimetres, whether you measure it on the real or McKee's?

Ms. Morrison: No, we do not know how fat the herd was.

Mr. Carrothers: Because the numbers are so great, all the errors are averaging out.

Ms. Morrison: No, the errors are not averaging out, and that is the point.

Mr. Carrothers: Not on the five boars, but they certainly would on the gilts.

Ms. Morrison: I will just repeat. The ranking of the pigs was wrong, so if you tried to pick the highest best, you might get the lowest. It was not as if the highest of McKee's was also the highest of Lambert's. That was not true. It was not as if the highest of McKee's was in fact the highest. That is clear too. It could have been the lowest, the middle one, anywhere.

The problem is, we do not quarrel with the fact that, on McKee's figures, they only selected for 0.3 millimetres of back fat. We have no quarrel with that. The problem is not their selection out of the herd, but the fact that the herd itself was fatter than they thought and therefore the pigs that they got were fatter than they thought. Anyway, enough of that.

Mr. Bossy: I just want to get clear in my mind concerning farm 1. I believe I have not heard from yourselves or from the ministry anything different than to say that herd 1 or farm 1 was one of the top farm producers,

breeders in Ontario if not in Canada. We are totally agreed on that. When you have that, somewhere along the line that farm just did not come by that accreditation, to be that credible as being the top.

We must also recognize in a herd of that size only, and we are talking about the amount of pigs, there could be a very small—and I say small—difference because in a top herd you have got a top breeder and you have got people management who are beyond question. Some place along the line, Farm Q also must have looked into that or known this farm for a long time, made that decision, went over there and looked at these animals because it is known across Canada.

Madam Chairman: Is this question going to be directed to the chair?

Mr. Bossy: Yes, right here. The difference we are talking about can be the difference between first and 10th or 20th, because if it is so small the difference would not be recognizable. That is how close that herd of hogs is; you go to a hog barn and you will find that. It takes an expert, and I would think a very expert expert.

I am asking one further question, because I think we are really going back to the credibility of McKee. The man is employed by the government, but also a producer. How long has he been a producer? Can I ask you that question?

Ms. Morrison: I do not know.

Mr. Bossy: Have you looked into the credibility? Because we are questioning his credibility.

Ms. Morrison: No. He made mistakes.

Mr. Bossy: But then we have to look at his credibility.

Ms. Morrison: We have never suggested that he tried to fix the figures. He made honest mistakes, there is no doubt. We have never questioned the fact that McKee somehow fixed the figures. He did not do that. Not just once, but over a number of years, McKee's figures were wrong. Everyone agrees they were wrong. They were wrong partly because he had bad equipment, partly because he was perhaps a bit careless in the way he made his measurements.

We have never suggested there was any bad faith on his part. But there is no doubt, and the ministry agrees, that his figures were wrong and that the pigs he tested looked leaner than they were. The ministry agrees with that.

Mr. Bossy: If he kept going back to farm 1 and testing those and farm 1 management saw these tests from Mr. McKee, then some place along the line farm 1 would have taken corrective measures to change its herd 1 or else it would have had to question, "Why are we rated number one in the country with these poor"—

Ms. Morrison: Because the figures were so good; he made them look better than they were, not worse.

Mr. Bossy: So Farm Q then did not make a bad decision to buy from farm 1?

Ms. Morrison: It was a very good farm; there is no doubt about that.

Mr. Bossy: So that in reality the discrepancy I am trying to get at here is we are talking about such a minimal discrepancy that you could arrive at those figures.

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Ms. Morrison: Right, but they got the wrong pigs. Even if I say, "Fine, they got the right herd," they still got the wrong pigs, because instead of buying the best pig they got some mediocre pig, because the figures on which they were basing this—

Mr. Bossy: You do not find mediocre pigs on a number one farm. There is just no such thing.

Ms. Morrison: But they were not getting what they bargained for.

Interjections.

Madam Chairman: Can I call this to order for a moment? I think Mr. Bossy's question really did not relate to the chart. I would encourage members to limit their questions to anything relating directly to the chart. If not, I would suggest that Ms. Morrison just finish her summation and then will be open to as many questions as everybody has to offer. Is yours to the chart, Mr. Charlton? I really want to give Ms. Morrison a chance to finish her presentation and then we can bring up any questions your little heart desires.

Mr. Charlton: Can I ask Ms. Morrison a question which I hope might clarify the difference between what she is trying to say and what Mr. Carrothers is questioning? Is it fair to say that the reason you are pointing to this chart with A and A', and B and a B' somewhere—perhaps, as you have suggested, equal with A' or perhaps 0.3 below A'; I do not think it matters much—is that A' with thicker fat is going to have a different value per hog than A would have, and that is why we are looking at this chart?

Ms. Morrison: That is right. You are not buying what you thought you were buying. Can I just go on with a couple of more points? Are we finished with this?

Madam Chairman: Yes, if you could sum up uninterrupted, and then we will open it to as many questions as there are to clarify.

Ms. Morrison: The question of the basis of choice by Farm Q of the herd and the pigs has come up again and again. It came up when Mr. Dombek addressed the letter on page 235 of the binder. This was a letter to Dr. E—Dr. Kennedy—at the university from Farm Q. Mr. Dombek suggested to you that somehow this letter showed that the only things Farm Q was interested in were health status, mainly, and pedigree.

This is clearly not evidence of that for a couple of reasons: One, it does not say he was not interested in any of the other things. In fact, it does say: "This is in the nature of a preliminary enquiry. Assuming your response is affirmative we could discuss details of selection criteria...."

By "selection criteria," of course we mean ROP statistics as at least some of the selection criteria for pigs. There is not any question in my mind that the complainant's assertion and our belief in the complainant's assertion that he bought on the basis of a number of different criteria is not challenged in any way by that letter.

Mr. Bell: Is not the basis of the purchase of the pigs set out in the contract? We have a contract. It speaks for itself. It sets out certain terms. Does the committee need to go anywhere beyond that?

Ms. Morrison: It needs to know that in choosing the herd in order to write the contract, the complainant was interested in a number of things, but not just ROP and not just health.

Mr. Bell: That is why I said the contract. The committee also has to concern itself with how those animals were selected, but in terms of what the terms or conditions of the contract were, I think they are fairly well set out.

Ms. Morrison: I would like to go back briefly again to the problem of pigs being fat because they are high health status. As I said at the outset of my remarks this morning, we have to be careful that we do not just say, "If an expert says it's true, it must be so."

Dr. Kennedy has told you that he is looking into writing a scientific paper now that would suggest—it is not proven yet—that pigs in a new high-health-status herd are fatter than usual. When we were doing this investigation, as I told you the other morning, one of the persuasive things the ministry said was, "Look, these pigs were fat because this was a new high-health-status herd and pigs in a new high-health-status herd are always fat."

We said, "Fine, show us that; that would be excellent." There was no scientific evidence of it, as Dr. Kennedy has said. It is common knowledge, he said.

So we went and asked pig breeders. That is where common knowledge should be, and it is not common knowledge; they told us it is not common knowledge. They said they know it was true at the University of Guelph isolation breeding unit, because in that unit the pigs are taken by caesarean section from the mothers, they are fed Carnation milk and they are fatter than the parents. They are raised in a different way. But we were told by breeders that it was not common knowledge that pigs were usually fatter if they were high health status.

Remember that, as Ombudsman investigators, what we have to do is evaluate the information given to us. We cannot just give up at any point and say: "Oh, well, that answers that. That's good. Goodbye." We have no vested interest in our cases. I can tell you we would have liked months ago to say: "Thank heavens, the ministry is right. Let's get rid of this one," but we could not do it, because we could not convince ourselves that what the ministry was saying made sense and that is why we are here.

A couple of words about the warning. The warnings about the ROP home statistics for use between herds were confusing and not paid attention to by the industry. I talked about that in my first submission. I pointed to Dr. Fredeen's report in which he acknowledges that the industry was using the home test statistics to choose herds.

In any case, as Mr. Bossy has pointed out, they got a very good herd. There is no evidence that their use of the home statistics was in error in finding this herd; it was a very good herd. It was just not as good as they thought it was, but it was an excellent herd.

The warning never said that the statistics could be wrong. The warning

certainly never said that when you get the herd you want and start choosing pigs, "Watch out, they could be wrong." The warnings never said, "Don't use the home test statistics to figure out your breeding." In fact, that is exactly what you were told yesterday these home test statistics were best for: to help swine farmers in Ontario improve their breeding by selecting the best pigs on the basis of back fat and growth.

In fact, we have heard that over the years the stock has improved from 19 millimetres to 12 millimetres because farmers have been using the back-fat statistics in order to improve the stock in their farms. That is exactly what the ROP statistics were for and that is exactly what they were used for by Farm Q.

Another question that came up in the ministry's submission yesterday which I feel I must address is the choice of the particular pigs on the basis of the computer printouts which you saw. I would like to go back to those computer printouts and have a look at the actual choice that was made on that basis.

They are found in volume V and the charts are at tab 143. A couple of pages in you will find the computer printouts, which are hard to read, showing the choice of boars.

Again, let me make something clear. We were at a meeting with ministry people and they brought these figures out and we looked at them and said: "Now that solves the problem. That makes this whole case go away. It is clear from the ministry's figures that there is no case here."

We went back, looked at it, thought about it, went into all of these figures and could not convince ourselves that this was true. That is for a couple of reasons. Farm Q was using more than one thing to choose its pigs.

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It was using the ROP home statistics, but it was also using the look of the animals. It is very much as if I am going to buy a car and I want two things in the car: I want it to get good mileage and I want it to be safe. When I go and get the figures for the car, I can find that there is a car which has excellent mileage but is not very safe. I have to ask myself what I am willing to throw away in safety for mileage.

In fact, if I took a list of cars and said: "Okay, here is a"—I am going to use miles per gallon because I cannot think in that other system—"50-mile-per-gallon car and here is its safety rating. It's not very safe. Let me look at the next one. It's 48 miles per gallon. Boy, that's pretty good. What's its safety rating? Not good enough," etc., what I would be doing is compromising between the two things I am interested in. However, if I bought a car that was 30 miles per gallon and rated very safe and it turned out that it was not safe, I would not be happy. In other words, I would be depending upon the ranking of safety to tell me what I was buying.

That is what Farm Q was doing here. It said: "I want pigs which are physically sound and have good ROP statistics. When I look at pig 1, if it is not physically sound, then I may not buy it because the physical soundness is important to me."

The most important thing to Farm Q was back fat. Dr. Kennedy has, in a paper that he has given us, said that this is quite usual for

high-health-status herds, that it is usual that the breeder is interested more in fat reduction than in growth.

So we had the figures for back fat index, etc., that are in front of you and we looked to see what was chosen. The first time I looked at these figures I said, "Well, that's that." But let me show you why it is not.

In the first set of figures there are 10 pigs. They are ranked by index, and you will see that the two Ys at the bottom show that, yes, they did; Farm Q chose 9 and 10. If you look at the back-fat figures, however, you will see that 9 and 10 have back-fat figures exactly the same as 1 and 2. So in choosing 9 and 10, they looked and found excellent-looking pigs with back-fat figures just as good as 1 and 2 and away they went.

Look at the next list. The first pig has 10.7 back fat. Then we have a whole bunch with around 11.7 to 12.2.

Mr. Carrothers: Excuse me. Maybe I am having trouble reading the figures here. The fat column is the one labelled "Fat," right? Obviously.

Ms. Morrison: Yes.

Mr. Carrothers: The ninth and 10th pigs had 11.7 and 11.6 on my chart. And the first and second had—

Ms. Morrison: They had 11.6 and 10.9, I think.

Mr. Carrothers: But 2 looks to have been the lowest back-fat figure and 9 looks to have been almost the highest back-fat pig in the range. I am not quite sure I—

Ms. Morrison: Pig 4 was the highest back-fat one. It was 11.9.

Mr. Carrothers: And 9 was right behind it.

Ms. Morrison: No, not as much as 6, 7 and 8.

Mr. Carrothers: They are all 11.7.

Ms. Morrison: Right.

Mr. Carrothers: And so is 9 on my chart.

Ms. Morrison: Right. So all I am saying is that in looking at these pigs, if you are interested in back fat and you are interested in how they look, if pig 1 does not look great, you will not be hurting yourself very much by going to pig 2, etc.

Mr. Carrothers: Yes.

Ms. Morrison: Remember that the ministry has told you that these figures are plus or minus a millimetre. Okay? So we are not going to lose a lot by going from pig 1 to pig 10.

Mr. Carrothers: Yes.

Ms. Morrison: And remember that we are trying to pick pigs on two things. This is like my mileage and safety. They expect that in compromising

to get a good-looking pig the figure 11.6 is the right figure; otherwise they will not be willing to compromise. So they are saying: "It doesn't hurt us to go down to 11.6, because we're willing to accept that." If it were not 11.6—supposing that were 14—they might not have wanted it. There is no way of knowing.

Mr. Carrothers: But wait a minute. We are back to this ranking one against the other against some real number again. These all could have been 25, for all that matters.

Ms. Morrison: They sure could.

Mr. Carrothers: It is the lowest versus the highest that is important. What you are saying is that these figures were used to choose the lowest-fat pig. Would you not have chosen pig 2 and pig 5?

Ms. Morrison: The problem is that we do not know, after all, which of these pigs is the lowest or the highest. We do not know at all. Having used these figures to choose them and then having bred them on the basis of these figures, we have made mistakes.

Mr. Carrothers: Knowing they chose pigs 9 and 10—I am trying to surmise the decision pattern that led to that—and looking at the actual numbers, the pigs chosen on the back-fat column seem to me to rank in the middle. I would have thought that if you were looking at that column, choosing the lowest and then going for physical conformation, you would have tended to be at the bottom end of that figure. Leaving aside the point that these may or may not be correct figures; they assumed they were correct, so I am trying to look at how they used them and I am trying to understand the point you are making.

Ms. Morrison: The point I am making is that when I first saw these figures, I said: "It's useless in this way: They never used the indexes at all to pick the pigs. They just picked good-looking pigs." But that is not true. What they did was look at the pig and say, "Look at the first one: not good enough; he doesn't look good enough. Look at the second one: not good enough; he doesn't look good enough," etc., until they found a pig which had both acceptable back fat and was a good-looking pig.

Mr. Carrothers: What you are saying is that the decision tree, if I may use that term, would start off looking at physical conformation. They would find a pig that looked good and then see if it had acceptable back fat.

Ms. Morrison: No. They started with the highest-indexed pig, the lowest-fat pig, and looked at it, and then they looked at the next one, and then they looked at the next one.

Mr. Carrothers: What I am having trouble understanding is that assuming this is the first-class herd it is supposed to be, if you started off with the lowest-back-fat pig and then knocked them off based on physical conformation, it would seem you would have run through almost every pig in that group in order to get to 9 and 10, unless I completely misunderstand how this would work.

Ms. Morrison: That is right.

Mr. Carrothers: I find that difficult to understand, because I would have thought that in such a high-quality herd you might only knock off one or two for physical conformation.

Mr. Charlton: If you look at one of the other charts, that is exactly what happened in other cases.

Mr. Carrothers: We are trying to surmise what the decision pattern was based on what happened. I am just trying to understand.

Ms. Morrison: Look at that chart over to the right. They looked at pig 1 and said no. They looked at pig 2 and said no. Then they looked at pig 3 and said, "Yes, we'll have that one." Okay?

Mr. Carrothers: But according to you, they would have started with another pig, not pig 1.

Ms. Morrison: No. I suggested that they started with the pig with the best figures, the best index, the lowest fat. They started with the pig with the best index and looked at it first. They looked at it and said no. They looked at the next one and said no. Then they looked at the third one and said: "That one's okay." What they are doing is using two sets of criteria to choose their pigs.

Mr. Carrothers: You do not happen to have a recalibration of these statuses with pig 1 being the lowest fat on this chart to the highest fat, so we could see that pattern?

Ms. Morrison: No. On this particular chart, it will go: pig 1, pig 2, pig 8, pig 4, pig 5, etc. You can see the order if you go down the fat.

Mr. Carrothers: I guess it is back to my point that it seems to me to be knocking off a high number of pigs based on physical conformity in what is a very high-quality herd.

Ms. Morrison: No, they only knocked off two here. They started with the highest-indexed pig, pig 1, and looked at him. Then they went to pig 2 and looked at him. Then they went to pig 3 and bought him.

Mr. Carrothers: Did you not just take me through 8, 9 and so on, before you got to—

Ms. Morrison: No. That is the order of the fat.

Mr. Carrothers: I cannot quickly reorder those in my mind. It is hard to read the numbers.

Ms. Morrison: They were not looking at them in order of fat. They were looking at them in order of index. Index is made up of two things: it is made up of fat and growth rate. The index is the thing that is down second from the right-hand side. See the thing that says index? They were looking at that and said: "Let's take the best one first"—

Mr. Carrothers: The highest indexed first.

Ms. Morrison: The highest indexed first, then the next highest indexed, then the next one.

Mr. Carrothers: Based on index now, not fat.

Ms. Morrison: That is right. But what I am saying is that when they have gone from 1 to 3, if they are interested in back fat—it is clear they

were—they have not lost very much by going to the third pig, because the change in index from 1 to 3 was mostly a change in growth rate and not very much of a change in back fat.

Mr. Carrothers: So what you are saying to me is that the decision pattern was to start with the highest-indexed pig, get one that had good physical conformity and cross-check to the level of back fat and see if it is acceptable.

Ms. Morrison: That is right.

Mr. Carrothers: That is how you are saying the figures were used.

Ms. Morrison: That is right. The reason I am saying that is that when I first looked at these numbers, I said, "It looks as if it did not matter at all to them what the indexes were." But that was not the case. They were using more than one criterion, which the ministry has told us they should do, in order to pick their pigs.

Now, what are the consequences of that? Look at the chart on the right again. They picked pig number three. They thought it had an index of whatever that says—123?—but it did not. They thought it had 11.9 millimetres of back fat, or something along those lines, and it did not. It was much fatter than that.

They used those figures in order to select which pigs to breed with which other pigs. Because the figures were wrong, they bred the wrong ones. The question of "What result?" has not been before you. The question we have been deciding is, did Farm Q make decisions based on wrong data, in such a way that if it suffered damage from those decisions, the ministry should pay? That is the question.

You could decide that it did make its decisions based on wrong data that were put out by the ministry and the ministry could come off without paying a cent. This would be the case Mr. Dombek was talking about yesterday. He said: "Lots of people make mistakes, but you don't have to pay for them all the time. You don't have to pay for your mistakes if you don't cause any damage." There is no problem with that; if there is no damage, there will not be any payment.

But the question you are deciding is not whether there was damage. You are not deciding the amount Farm Q suffered. What you are trying to decide is, is it reasonable, as the Ombudsman thought it was, to say that Farm Q based its decision in buying its pigs on wrong ministry data, and that if it thereby suffered any damages, the ministry should pay? That is the question and I think it is very important you have that question clearly in your minds.

If it turns out that you say yes, and when the question of whether the pigs were in fact sold for slaughter or sold for breeding turns out to be answered in the negative, that is, it turns out there was not enough evidence of damage that you could say, "The damages were X thousand dollars"—if the damages were zero, the ministry will pay zero. That is not the question. The question is a liability question, not a damages question.

Mr. Bell very carefully divided those questions for you before we began. It is very important that you stick to that particular question.

I have one more thing to say, just a very quick summing up. When Mr.

Dombek started yesterday to talk about the question, he pointed out to you that this was a question of pigs, and he also pointed out to you a lot of characteristics of the breeder, that the breeder is a pig farmer, an excellent pig farmer, a knowledgeable pig farmer, a very good pig farmer.

There should be no sense in your minds, however, that your decision about whether this set of circumstances leads to liability on the ministry depends upon whether this is a rich pig farmer or a poor pig farmer. That is not the question, the basis on which you make decisions on this committee.

It would not help me if I could show you that this was a poor little person on a one-acre lot somewhere. That will not help. You are not interested in what this pig farm is in terms of its business. You are interested in the question of liability.

Everyone has agreed the data were wrong. The ministry has agreed over and over again that they were wrong. The ministry has agreed that it produced the data, that it published the data and that it distributed the data, so there is no question about that.

Everyone agrees Farm Q relied upon the data. There is no question they used the data in making their decisions. Everyone agrees the data were wrong in such a way as to make the pigs fatter than they should have been. It is in the synopsis, and I draw your attention to the fact that this is an agreed fact with the ministry. The ministry agrees that the pigs Farm Q got were fatter than they should have been, given the data.

The Ombudsman found that the ranking of the pigs, and therefore the choice of the pigs Farm Q used in its breeding program, had been compromised by the errors in the statistics, that the pigs were not only fatter but that Farm Q could not tell which pigs were fatter than which other ones. They did not know, when they organized their breeding, which pigs were which. The Ombudsman found that this compromised the ranking and that as a result of the compromise, Farm Q suffered loss.

The question of how much loss was not determined. If there were no losses, as I say, there will be no payment.

Mr. Bell started out his comments to you the day before yesterday suggesting the role of the committee, and I have to come back to that for one minute. This committee, as you know, and Mr. Bell has said it a thousand times to you, does not reinvestigate matters the Ombudsman brings before it. What this committee does is try to find out whether the Ombudsman reasonably could have come to the conclusion and recommendation he did and whether he followed the steps he was supposed to follow in his investigation.

As I said earlier today, we followed many steps in this investigation. There were many times when we would have liked to have said: "That's that. We're finished with this." We have no vested interest in supporting complaints; that is not our work. What we cannot do in good conscience is throw out a complaint we feel has merit.

We tried. We looked at the expert's reports. We looked at the ministry's position. We did everything we could to try to find out the very basis of this complaint. When push came to shove, we brought it to you because we feel it has merit and we feel the ministry has not satisfactorily explained away the problem.

It is your job, not to reinvestigate the matter, but to look at what the Ombudsman completed and recommended to see if what he said is reasonable in the circumstances, to see whether he followed his process and whether he reasonably could have come to the conclusions and recommendations he did. I think you can find that on the basis of the information we have put before you.

Madam Chairman: Thank you, Ms. Morrison.

Ms. Morrison: I have one more tiny thing. Allan Lee reminded me that I wanted to draw it to your attention. It is in the blue volume, volume III, tab 40, the first tab. This is a letter from the ministry's expert, Dr. Fredeen, to Dr. Pettit. I would like you to have a look at the postscript.

"In the final analysis, OMFA may consider that some form of financial settlement is justified." This is the very problem we are talking about. "In this event, any settlement would be based on an estimate of losses associated with errors in the choice of seed stock."

The letter is dealing with this problem you have before you.

It is clear the question was not a simple one. The question is not a simple one. The Ombudsman's view is as at that point Dr. Fredeen's view was, that there is some basis upon which the ministry could be held liable for mistakes made by Farm Q in its breeding program, because it relied on information put out by the ministry and given to the industry by the ministry as reliable data. There was never, as I said before, any warning that the data might be wrong and they were.

Any questions?

Mr. Carrothers: I was just absorbing this last point. We may come back to it.

I want to get back to the choice of boars here, I guess. This is what we have the statistics for. Could you give us an idea of the proportion of weighting that you think might have been used for, say, the index and the back fat? Would they sort of be equal, 50-50, or would it be more physical conformity? I guess the index—the three of them then. It seems that on some of these charts, they went way down the list before they cross-checked the back fat, and on some others they did not go very far, which makes me sort of wonder how much physical conformity was the overriding factor, whether it was equal to the index or what. In your mind, have you put a number to that which might help me understand it?

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Ms. Morrison: My understanding of the decision-making process was this: Start with the top, and if it looks good, buy it. Then move down until you find one that satisfies you in terms of its physical characteristics. I do not know whether you can say that is 50-50, but what you can say is that you started by trying to find the best on index. If it did not look good, then you went to the next one.

My point in looking at the charts was to show you that in going down to the one that looks better, if you went from a pig that was 11.7 to a pig that was 11.8, you had not really—this would be true if you were buying a car. If I went from a car whose safety rating was 83 per cent to one with a safety rating of 82 per cent that improved miles per gallon by five miles per gallon,

I might say that was a good tradeoff. That is the kind of decision-making that is going on here.

Mr. Carrothers: I guess the reason I ask it is that on another one of these charts they went from a pig that was 10.7 to a pig that was 12.2. The variance was higher. I am just trying, in my mind, to assess how these might have been used. It seemed physical conformity was quite important, anyway.

Ms. Morrison: There is no doubt physical conformity was important.

Mr. Carrothers: They would use it to override the index quite a bit.

Mr. Charlton: That one was Miss Piggy.

Mr. Carrothers: It might have been. No, it could not have been; it was a boar.

Ms. Morrison: On the other hand, once you have chosen it, remember this: You have chosen it and—suppose you have chosen a 12.2. Then you are going to say, "I am going to use that 12.2 in a different way than I am going to use my 9.4, the other one I chose. I am going to breed that one differently because it is a 12.2." If it turns out you were wrong about which one was a nine and which one was a 12, you have really screwed up.

Mr. Carrothers: I guess what I am trying to come down to is how much the numbers were being used and how much is sort of, I do not know, look and instinct that you might apply, especially with this process. It was not just the numbers.

Ms. Morrison: It was not.

Mr. Carrothers: Obviously, they were rejecting them. There was that kind of sense, "I like the way it moves." I do not know. I am not sure what you would look at. The way it moves, maybe.

Ms. Morrison: That is right, okay, but think of this. I go back to the miles per gallon again. Suppose I bought a car. I looked at 50-, 45-, 40- and 35-miles-per-gallon cars. The 35 one was safe, so I bought it. Then it turned out that it got way fewer miles per gallon. I would be mad about the fact that it was not 35, whether or not I had used some other thing as part of my choice mechanism.

Mr. Carrothers: You might be mad it was not 35, but your decision factor might have also weighed in on how it looked, how it performed and how it rode. You are mad about it, but it may be that you are mostly satisfied, in terms of your analogy.

Ms. Morrison: No, not true.

Mr. Carrothers: Otherwise, you would choose strictly on the mileage figure and ignore everything else.

Ms. Morrison: But I am saying it would not make sense for me to do that. No one pays on the basis of index alone and no one buys a car on the basis of mileage alone. That is the only point I am making.

Mr. Carrothers: That was just what I was trying to assess, how these

were used. You have not, in your own mind, put a number on this then to say it was 50-50 or 60-40.

Ms. Morrison: They were both important. That is all I could say.

Mr. Carrothers: Okay; thank you.

Mr. Bell: Just a couple of items. Ms. Morrison, can you refresh us? What were the factors considered by the complainant in selecting farm 1?

Ms. Morrison: They selected it on the basis that it was a herd that could supply pedigreed animals, a herd that had high health status, a herd that had enough animals to supply its needs, or almost, and the fact it had good statistics.

Mr. Bell: What statistics?

Ms. Morrison: Record of performance statistics.

Mr. Bell: Home tests?

Ms. Morrison: The station test statistics for this particular herd were not reliable because the sample size was too small.

Mr. Bell: So the statistics they used and relied upon were the home tests.

Ms. Morrison: Because those were the only ones available.

Mr. Bell: Okay. You suggested to the committee a question it might consider in deciding this matter. How about this one for the committee, whether the ministry should compensate the complainant if any loss was suffered as a result of reliance on home test data in the selection of pigs for purchase and breeding?

Ms. Morrison: Do you want to run through that once more?

Mr. Bell: Whether the ministry should compensate the complainant if any loss was suffered as a result of its reliance on home test data in the selection of the pigs for purchase and breeding.

Ms. Morrison: I would agree with that.

Mr. Bell: In other words, there are two elements to that. Compensation will depend on (a) whether a loss was suffered and (b) whether there is a causal connection between that loss and the home test data.

Ms. Morrison: That is right.

Mr. Bell: We all know losses can be suffered in a number of ways or expenses can be incurred in a number of ways. You have to tie into something.

Ms. Morrison: That is right. As I understood it, the question the committee was addressing was that connection. Was there a connection between the loss that was suffered by Farm Q and the ministry's program?

Mr. Bell: Why? How can the committee decide that? The committee does not know whether a loss was suffered.

Ms. Morrison: A loss, if any.

Mr. Bell: No. How can the committee decide whether any loss was suffered without knowing if a loss was suffered? Cannot the committee only decide that if a loss was suffered and if it is causally related, whether there should be responsibility on the part of the ministry?

Ms. Morrison: There are two levels to that problem, I think. If you decide the complainant relied on the figures, but the figures did not make any difference to what he bought, that will be one problem solved.

Mr. Bell: Why does the committee have to worry about that question?

Ms. Morrison: You have to worry about that question because we have not addressed the question of the losses, i.e., whether they sold any pigs for slaughter. We are satisfied they did. We are not sure how many. We do not know what the losses were. You have not looked at any of that.

All the committee has had before it is the question of whether the ministry was responsible for the statistics. Answer, yes. Were the statistics wrong? Answer, yes. Did the complainant rely on the statistics? Answer, yes. Should the ministry therefore pay the complainant for any losses thereby suffered? Answer, of course.

Mr. Bell: I do not think we are talking about different things, but I just want to make sure your view is that the committee does not have to address the causal connection question.

Ms. Morrison: It does have to address the causal connection question.

Mr. Bell: How does it do that without determining whether a loss was suffered? Otherwise, you are building a bridge without going to the other side.

Ms. Morrison: The committee could do this. The committee could say that if the complainant suffered a loss and it can be shown the complainant suffered a loss, the ministry should pay. That is a decision the committee could make.

What the committee would be doing then is saying: "We think the circumstances of this are such that the ministry should pay. Somebody else should determine how much." If that turns out to be a very low amount, that will still be your answer.

Mr. Bell: But how is that fair to the ministry? The committee will then have determined the causal connection. How can the committee or anybody determine a causal connection until you know whether a loss was suffered? Why can the committee not say, "If there was a loss and if it was connected to the test data and reliance on same, then pay"?

Ms. Morrison: That is right. That is exactly what I want the committee to say.

Mr. Bell: I think, then, you are agreeing with me that, and this is all hypothetical, if the question of whether the ministry should pay is determined in favour of your recommendation, then the committee would have to

address what the appropriate process is to determine causality and loss, if any.

Ms. Morrison: You would certainly have to find out what the losses were. That is right.

Mr. Bell: I do not know where this is going, but I want to make sure there is no automatic payment just because a loss is shown, because losses can be suffered in a number of ways.

Ms. Morrison: The losses would have to be connected to the reliance on the ROP program. I agree.

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Mr. Lupusella: It was my understanding yesterday or at the very beginning when Mr. Bell introduced this case to committee members that it was based on the premise of whether the ministry was liable as a result of this complainant's case. That was the only issue that was addressed to this committee, nothing else.

Now, the essence of this case which has been introduced to us as a committee boils down really to the case of Mr. McKee, as to whether his wrong information makes the ministry liable as a result of the complainant's case. That is the essence of this presentation, as far as I understand it.

Madam Chairman: I think we can clarify that when we are in camera.

Mr. Lupusella: I do not understand the relationship between losses and so on when in fact we are only supposed to address the issue of liability and nothing else.

Mr. Cureatz: Ms. Morrison, have you been on this case since its inception?

Ms. Morrison: Dr. Lee has.

Mr. Cureatz: I am interested in how it came to the Ombudsman's office.

Ms. Morrison: It came through the documents that you see at the beginning of your binder.

Mr. Cureatz: I know, but did someone call, or did the operators of Farm Q say at some point in time after the various investigations, "Let's call the Ombudsman's office"? I would like to know some practicalities of how it got to the Ombudsman's office.

Ms. Morrison: I think the first contact with Farm Q was a submission by Farm Q to us that he was dissatisfied with the ministry's response to his complaints about the problem with the rate of performance data. Once he found out that there were errors in the probes, he went to the ministry, as you see from its documentation. There were meetings. When he was dissatisfied with that, he came to us.

Mr. Cureatz: I do not need a specific date. That is helpful to me.

Were there any discussions in terms of other approaches that Farm Q

might have taken or would take besides the Ombudsman's office: namely some kind of legal action?

Ms. Morrison: We always are careful, when we have complainants who have a prospective legal action, to talk to them about the fact that our process is a very different one. It is open to complainants to choose our office instead of legal action. We do not usually investigate—in fact, we never investigate—if someone is in the process of a court action on the same issue. But we cannot make a complainant go to court.

If they come to us and say, "We want you to investigate this," and "this" is a ministry action, it is a jurisdictional complaint and the Ombudsman cannot say, "I do not feel like investigating that." We have an obligation to investigate complaints against government action.

Mr. Cureatz: Sometimes not as thoroughly on behalf of the elected officials as one would like, I might add.

Ms. Morrison: Do you have a complaint?

Mr. Cureatz: We will discuss that another time.

Getting back to the time frame, I do want to know the length of time that the Ombudsman's office spent on the kind of thorough investigation that you have presented to us.

Ms. Morrison: We received this complaint on May 8, 1985.

Mr. Cureatz: When the office is investigating it, will you assign an investigator, one, two? How is that sorted out?

Ms. Morrison: How is an investigator assigned?

Our office is divided into teams of investigators and the teams of investigators deal with particular ministries. For example, we have a team that deals with social assistance and all those kinds of problems. The team that dealt with this problem is the team which deals with technical problems. They deal with the Ministry of Agriculture and Food. They deal with the Ministry of Natural Resources. They deal with the Ministry of the Environment, the Ministry of Revenue. All of the complaints that we get in those areas tend to be very technical. For that team, we have people like Dr. Lee as investigators because of their qualifications.

Mr. Cureatz: How many people would be investigating this particular inquiry?

Ms. Morrison: Dr. Lee was the investigator, but involved in the investigation at various times were myself, as the director of investigations, the assistant director in charge of the particular team, counsel for the team—a lawyer who advises the team—and our general counsel, Michael Zacks, was involved at one point.

I think the very first letters on the file were written by what we call an investigative researcher. When a file first comes in, it is not assigned to an investigator right away. It is assigned to a person who does the preliminary correspondence. So there would have been an investigative researcher, as well.

Madam Chairman: And, of course, the Ombudsman.

Ms. Morrison: And, of course, the Ombudsman. He did not, in fact, investigate the whole complaint, but he looked at the results of the investigation.

Mr. Bossy: We heard so much about buying a car. When you go to buy a car, you see this car sitting in the showroom and you get all the specification sheets for that car, what it should do and everything else; then you make the decision on the basis of what the specifications are, how it will perform and what the safety factors are. You buy that car. What you see is what you get.

What is your recourse if you do not get 35 miles to a gallon—we will use the old units—you expected it to get that, and it only performs at 25 miles per gallon? What recourse do you have by going to the garage or to the company that makes the car?

Ms. Morrison: It depends on how important the factor is. For example, cars which have proven to be unsafe, although the manufacturer said they were safe—people have sued for many millions of dollars because the car was supposedly safe and turned out not to be. You might have heard of the Pinto.

Mr. Bossy: But the mileage would not have had any—

Ms. Morrison: Mileage? You could sue for that if you wanted to, but it would cost you more to sue for it than you would get back. So it would not be worth it.

Mr. Bossy: So really, what you are saying is, if then the person finds something different from what he or she figured he or she should get, the person should sue. By suing—that should be through the court.

Ms. Morrison: That is if it is a garage. We do not have any jurisdiction over garages. We have jurisdiction over the Ministry of Agriculture and Food.

Mr. Bossy: But suing still comes through the courts.

Madam Chairman: Thank you, Mr. Bossy. Before Mr. Charlton begins, can I have some direction from the committee as to how many more questions—Mr. Charlton is the last one on my list.

Interjection.

Madam Chairman: If he is the last one, then perhaps we could finish with that and go into a vote discussion this afternoon. If not, if I see a number of other people interested, I think we should adjourn and start back at two o'clock.

Mr. Charlton: Perhaps I can resolve this for you. I will pass.

Mr. Cureatz: Ah. Resolved.

Madam Chairman: I had a number of questions.

Mr. Cureatz: Oh, oh. Wait a minute.

Madam Chairman: I have one short question.

Interjection.

Madam Chairman: Ms. Morrison, Mr. Bossy had made the comment that, in a good herd, as this one was, there really was not any such thing, and I am paraphrasing and you may correct me, as a mediocre pig. What is your reaction? Is that an accurate—

Mr. Bossy: One single runt and you have a crowd. A manager would have that runt out of there so fast, because he could not contribute to the health and whatever.

Madam Chairman: But your comment was that in a good herd there is no such thing as a mediocre pig. What would your response be to that comment, because you did not have an opportunity?

Ms. Morrison: I think this was a good herd and there were no bad pigs in it. The problem is, if you are choosing out of, for example, a very good class, the very best and brightest, it will not be very much comfort to you if the class on the whole is above 50 per cent, but you wanted a 90 per center.

Farm Q wanted the best pigs from the herd. They wanted the best pigs from a good herd and they chose a good herd. There were no 25 per centers, or 15 per centers in the herd. They were all between 50 and 100. But they did not want a pig with a mark of 50. They wanted one with a mark of 90 and they did not get it.

Madam Chairman: Dr. Kennedy, is there such a thing as a mediocre pig in a good herd?

Mr. McCague: Sure.

Dr. Kennedy: I will have to use the microphone.

Madam Chairman: A "yes" or "no" answer is really what I am looking at.

Dr. Kennedy: I will have to qualify it. Everything is relative. If you buy pigs from a top breeder, there will be far fewer mediocre pigs than buying pigs from a poor breeder. There is no question about it.

Madam Chairman: Thank you. I just wanted to make sure the record was correct on that issue. I would be willing to give you 31 seconds, Mr. Dombek, if you would like to take that for any closing comments, because you made reference that you would not have an opportunity.

Mr. Dombek: I think it has all been said. I think the issue is fairly clear. The facts are very complicated, but I am sure this committee has heard all of the evidence. I would like to thank the members of the committee and you, Madam Chairman, for giving us this opportunity to address the issue and giving us a fair hearing.

One procedural thing I would suggest is that in future, for other ministries and so on, when the Ombudsman does table its black binder that a

copy be sent over to the ministry. It would avoid a lot of duplication of paper in the future.

Madam Chairman: I understood that you did get a copy.

Mr. Dombek: Not of this.

Madam Chairman: And that if you did not from the Ombudsman, we ensured that you did get a copy,

Mr. Dombek: No, Madam Chairman. If you will recall, back in the Capracore issue we never got one there.

Madam Chairman: I know. That is why I have resolved that. I thought that problem had been resolved.

I think I will personally have to get a pig and deliver it over there next time. I thought that had been resolved and perhaps, with the change of clerks, it was not. Mr. Bell has one comment.

Mr. Bell: I just want to say that I have been around here now for a number of years and the quality of the submissions from both sides in the last three days has been among the highest I have ever seen and, I would venture to say, the committee has ever seen. I lied when I said it was not a difficult case. It is a difficult case and it was done, I think, in a first-rate manner.

You were able to grasp the issues significantly as a result of the quality of the submissions and the thoroughness. I want to commend Mr. Dombek, Ms. Morrison and all others who have participated at that end of the room on your behalf. Thank you.

Madam Chairman: Thank you, Mr. Bell. I agree this is the best response we have ever received from a ministry before our committee in my time.

The committee will adjourn until two o'clock, at which time we will be in camera. We ask that members making presentations stay around this afternoon and we hope we will have a decision for you at some time this afternoon. Thank you.

The committee recessed at 12:02 p.m.

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Thursday, March 30, 1989

The committee met in camera at 2 p.m. in committee room 2.

1614

CASE OF FARM Q LTD.
(continued)

Madam Chairman: If we can reconvene the meeting, first, in my role as chairman, I got the authorization of the committee to mention something that came to my attention only this afternoon and that I strongly object to. I am not sure whose hand I am to slap for it, but there were articles placed in front of all committee members except me as chairman. They were not anonymized. It was an article from a newspaper, Farm and Country. They were highlighted.

I think in future everything has to go through the clerk and through the chair before it is placed in front of every committee member. By all means, someone could do it in the hallway or somewhere else, but the articles should not have been placed in front of us on our tables. I think that broke an informal rule that we do have as a committee. I wanted to mention it, because perhaps not mentioning it would encourage further such activity. I do think that was inappropriate.

The committee has come to a decision and has decided the following question in the affirmative: whether the ministry should compensate the complainant for losses suffered, if any, as the result of and to the extent of the complainant's reliance on the home test data in the selection of pigs for purchase and breeding.

The committee has also decided that the issues of loss, causation and reliance should be determined by some adversarial process. The parties are urged to come to some agreement on the process. If they are unable to agree, the committee will reconvene and decide the process after hearing submissions from the two parties.

Do you have any questions? I know I read it very quickly.

Mr. Dombek: Would you mind reading the question?

Madam Chairman: We can certainly provide you with a copy. It is whether the ministry should compensate the complainant for losses suffered, if any, as a result of and to the extent of the complainant's reliance on the home test data in the selection of pigs for purchase and breeding. That question was decided in the affirmative.

On behalf of the committee, I can only reiterate John Bell's comments. I think, certainly in my time here on the committee, this was perhaps the best presentation we have had, particularly dealing with very technical matters and, more important, the ministry's response. I have been very impressed by the fact that they did come very prepared and provided us with an enormous amount of great information that, while the question may not have been decided

completely in their favour, was very valuable. In the past, some ministries have taken this committee somewhat lightly, and we appreciated the time and the effort that was taken by the ministry in this case.

There being no other business, this committee is adjourned until further notice.

The committee adjourned at 4:20 p.m.

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No. B-2

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Official Report of Debates

Legislative Assembly of Ontario

Standing Committee on the Ombudsman
Estimates, Office of the Ombudsman

First Session, 34th Parliament
Wednesday, January 11, 1989

Speaker: Honourable Hugh A. Edighoffer
Clerk of the House: Claude L. DesRosiers

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LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON THE OMBUDSMAN

Wednesday, January 11, 1989

The committee met at 10:10 a.m. in room 151.

ESTIMATES, OFFICE OF THE OMBUDSMAN

Madam Chairman (Miss Nicholas): Can we call this meeting to order? Today we will be dealing with the estimates of the Office of the Ombudsman.

First, I have two administrative matters to deal with. One I want to discuss with the committee is that next week we will start discussing our report on expanded jurisdiction. Mostly when we go into a report, we do it in camera. I just wanted to make sure that is an acceptable method of discussing expanded jurisdiction, in camera as opposed to when we had the public hearings.

Is there any objection to going in camera? None? Thank you. Next week we will be in camera dealing with expanded jurisdiction.

Mrs. Meslin: I take it then that our presence will not be required, is that correct?

Madam Chairman: Yes. I do not believe it will. If we do require your presence, then we will follow up the following week with you present, if that is possible, or for any questions that ensue from our first meeting.

Mr. Philip: May I just suggest that the clerk inform the House leaders that we would be willing to be assigned a room other than the television room? It is not fair for us to occupy this room for an in camera meeting.

Clerk of the Committee: Mr. Philip, there was a request from the standing committee on government agencies to use this room because it has a French presentation.

Mr. Philip: Fine.

Madam Chairman: Then it is convenient for them if we decide not to use this room, so we are doing them a favour.

The second item is that Mr. Philip wanted to put a few comments on the record before we commenced estimates.

Mr. Philip: Since it is his last set of estimates prior to his retirement, I just wanted to say to Dr. Hill how much I, as I guess the longest-serving member of this committee, appreciate the job he has done for the people of Ontario and his co-operation with this committee and his honesty

and forthrightness in dealing with issues and then answering questions.

Unfortunately, I am faced with the metaphysical problem that I have not found a way of being in two places at one time and at 10:30 I am going to have to be in another room in this building on another important parliamentary matter, so if I do not get a chance to ask you as many questions as I normally do during your estimates, it is not lack of interest or disrespect and I hope the Ombudsman and his staff will understand that.

I know all members of the committee will want to join me in saying we hope that in your retirement you will be a constant source of information to the committee and to the literature that is coming out on the Ombudsman. We know we will see you at conferences and we hope that we will be able to have your advice and read your articles, or memoirs or whatever, in the various journals and have the benefit of your insight.

I think you are the first Ombudsman who has really explored in this jurisdiction what I think is the most important role of the Ombudsman, namely the study of systemic problems rather than simply dealing case by case. I think that has been a major achievement during your term as Ombudsman. I think that has been a major advance and no Ombudsman can ignore that, hopefully, in the future, whoever that person may be. History will at least give you credit for that major achievement in Ontario.

Madam Chairman: Thank you Mr. Philip. Perhaps the other committee members will recognize that after Dr. Hill's comments you will only have a few minutes here, and will accede to your request to ask some questions first.

We will begin with Dr. Hill. If you have some opening comments on your estimates, and then we will proceed.

I was remiss in not introducing the other members at the front table. They are Eleanor Meslin, executive director of the Ombudsman's office, and Allan Mills, controller of the Ombudsman's office.

What a relief. We even know titles today. Dr. Hill, if you would commence your remarks.

Dr. Hill: First, let me say that I very much appreciate the comments made by Mr. Philip and I have also appreciated the excellent co-operation

and the joy, indeed, of working with this committee. I will miss it when I step down.

One of my first duties when I was appointed Ombudsman was to present the office's estimates for 1984-85 and now, as I am just about to retire, one of my last duties is to present these estimates for 1989-90 on behalf of my successor.

I am pleased to report that we have kept within the guidelines for expenditure increases in the preparation of estimates for six years, and in one year, indeed, I did not request any increase in money at all. In this sense and in the way that the approved estimates have been spent, I believe that the office has demonstrated the highest degree of fiscal responsibility. This view is supported by the fact that during my tenure there has been no adverse criticism of this office from the Provincial Auditor. I believe, therefore, that I am leaving the office in excellent shape.

In 1985, I instituted the practice of having the executive director and the controller review each manager's budget submission with him or her before finalizing and incorporating it into the office's estimates. This practice has been continued each year and the staff involved have become used to having to justify their funding requests. This in turn has heightened awareness of their fiscal responsibilities and thereby contributed to their skills as managers. I sincerely hope that my successor will continue to follow this practice in preparing the office's annual estimates.

The estimates which I am submitting today are for a total of \$7,471,100. After adjusting the current approved estimates by \$207,900 to reflect cost-of-living increases awarded during 1988 but not included in those approved estimates, I am requesting an increase of \$140,500 or 1.92 per cent of the revised budget base. I should explain that it is a long-standing practice not to provide for cost-of-living increases as part of the main estimates, but, with the approval of the Board of Internal Economy, to pay them to employees as they are announced and then to adjust the budget base for them before preparing the following year's estimates.

Since this committee has not reviewed the office's estimates for 1988-89, it is appropriate for me to provide some necessary background information. Last year, the Board of Internal Economy approved an additional seven complement positions. Three of these positions were required to implement the French Language Services Act and the other four positions were required in order to staff the field offices in London, North Bay, Sault Ste. Marie and Windsor on a full-time basis.

Thus, the office's approved complement was increased to 129. Incidentally, I think I started with an approved complement five years ago of 122, so I have only increased the complement in five years by seven. I will open the storefront office in Sudbury this month but will not require any additional staff for it at this time.

I believe that the narrative contained in the copy of the estimates supplied to you explains this submission comprehensively. However, my executive director, Mrs. Meslin, my controller, Mr. Mills, and I will be pleased to answer any additional questions you may have.

1020

Mr. Cousens: I have just one question, if I may ask, on measuring the performance of your operation. It has to do with the time it takes to respond to a person's complaint and then get back to the person. Do you have any kind of comparison you have done of an evaluation of the cost comparisons, which we are all concerned about? I am also concerned about measuring the effectiveness of the organization against some standard.

So maybe you could just give us some thought on what is the average time it takes to respond to a person. Do you have any guidelines as to when people would hear back from your office? What is the mean time of disposing of major types of problems that you have?

Dr. Hill: We have improved our performance over the last number of years considerably in this regard, but I think I will ask the executive director to tell you what measures we have taken in terms of response time and things of this nature.

Mrs. Meslin: First of all, we recently supplied to the committee a report that we had done by an outside consultant to assist us with exactly the questions you are raising, because although we have improved, we have felt that we did not grasp enough of the difficulties of providing speedy, expedited service.

Our rule of thumb is, of course, that when a written complaint comes in, the acknowledgement of that complaint goes out within a turnaround time of two or three days, to let the people know we are looking into it or that an investigator may be coming—one of those instances. Then a great deal depends on the complexity of the case as we begin to get into it.

Most of our cases have a very good turnaround time. They are completed within about three months, only because they have not involved complete investigations. They have been cases that can be responded to very rapidly. The ones

that we have to investigate take a much greater time.

What we have done overall is to develop a monitoring system with each of our investigative teams. I have a reporting relationship where they have to let me know at a given time why something has not moved in, let's say, three weeks. They do that with their supervisors, too, so it is an ongoing process. We have not measured costs per case because that would be almost impossible.

Mr. Cousens: No, I was not asking for that, either.

Just to follow through on that, could you, through the Ombudsman, tell me how many cases are outstanding right now: over three months, six months, nine months and a year, and what percentage they are of the total load of the Office of the Ombudsman?

Mrs. Meslin: I would have to get the information. I did not bring it with me, but I will get it.

Mr. Cousens: I do not want to put you on the spot, but how many would you see now that are still under your purview that are in excess of a year? Aside from some of mine that come from my office.

Mrs. Meslin: I would say, given the fact that one of our cases comprises 358 individuals, if I counted them individually, that we probably have close to 500. But if I take the 300 away and say that is one issue we are dealing with, it is less than that.

Dr. Hill: My controller tells me that approximately 35 per cent go back more than one year.

Mr. Cousens: I do not want to prolong this. I know it is an ongoing concern that Mr. Pollock, who has been far more involved with the Ombudsman, has discussed with me within the committee. I know it is a matter of ongoing concern, I am sure, to the Ombudsman.

That is the concern people have. They are out there waiting for a response from you. I think there is a high level of trust. Certainly from where I sit, there is a sense of dedication within yourself and your people that is noteworthy and which we appreciate. I just have to say that in being thorough, in doing that job and in garnering your resources, which I think you have to do, there is also that time lag that goes into effect. That becomes the push-pull of an effective operation.

Dr. Hill: It is a difficult problem. One of the things we always have to deal with is the response from the ministries and the delay we

believe it takes getting a ministerial response from ministry A, B or C.

In order to combat that I have set up a battery of committees with the ministries to sit down with them and say, "Look, you are taking too long. We need a faster response time." We have been trying to push on that level, because quite a bit of our problem has been the fact that we push and push to get a faster response from the deputy, from the ministry or from the minister. That does take time.

Mr. Cousens: Do you have a report card on the ministries? Can you tell us which ones are very fast and which ones are very slow?

Dr. Hill: I cannot tell you right here. I could pretty well tell you if I sat down and looked at it for about 30 or 40 minutes.

Mr. Cousens: I am sure, Madam Chairman, that he could give us a very good insight right now. Which is the worst ministry and which is the best one?

Dr. Hill: Put my finger on the pulse, you mean?

Mr. Cousens: Yes. Before you go, you could go out in style.

Madam Chairman: They do have this information. The Ombudsman's office has provided this committee with this information in the past and I am sure that they would be more than willing to provide it for us again. They had it down to exact days of response time. If they did earmark the ministries that are a little slow in their response—

Mr. Cousens: I would be most grateful if I could see that updated information, especially to see if there has been any improvement since you have come in; if you have had any influence on the Ministry of Education or the Ministry of Health.

Dr. Hill: In general terms, I can say there has been an improvement because of the committees we have established with the deputies and other ministry officials. It has taken a little time.

Mr. Philip: As I mentioned earlier, I have to go to this conference at 10:30, so I am just going to ask one question. Perhaps you can put me back on the list and when I get back in here at 11:30 I can ask a few other questions.

One of the things that, hopefully, we will be consulted on as a committee will be the appointment of your successor. There are different schools of thought as to the qualities of an Ombudsman. Just dealing with one of those attributes, some would argue that the office is so strenuous that it would be very useful to have a

younger person in the middle of his career, with a lot of energy to promote that office.

On the other side of that issue we have a situation where, in one of our provinces, an ombudsman who was an outstanding authority in the field, a professor dealing with the Office of the Ombudsman and writing about it before he was appointed, did not have his tenure renewed. In the middle of his career, it was quite seriously affected because he was so effective. He went into various types of semi-employment for a period of time, at considerable financial disadvantage to himself.

Professor Caiden from the United States, who is a well-known author on the Office of the Ombudsman, described that problem in saying—and I quote from his latest paper, which was delivered on October 24, 1988 to the international conference:

"The Ombudsman is a troublemaker; the office takes fault, and does not give up when it stumbles on something that government would prefer not revealed.... Unless the incumbent has a private means or ready alternative employment, success on the job may be quite costly.

"Undoubtedly, governments would prefer tame ombudsmen who can be relied on not to cause waves, not to ruffle officialdom, not to claim too much credit, not to be too bold and enterprising and not to be too popular. Rather, they should be self-effacing, modest, professionally unassuming and unambitious. But if all incumbents were to behave as governments and bureaucratic élites want, they would have little point in having an ombudsman at all.

"None the less, the problem remains for incumbents as to how far they can go or will be allowed to go in doing their job before they jeopardize their own career."

1030

I guess that leads me to the question of, does it make some sense on the other side of the argument—for those who are arguing for a young, energetic Ombudsman—is there not a very strong argument on the other side that perhaps the Ombudsman should be someone who is of impeccable professional status, who has reached that level of professional status where he may be five or 10 years from retirement and therefore has nothing to fear, because he has secured his financial future and reached such a level of status that he is not threatened by any bureaucrat or government, and therefore would be more objective and not fall under the influence or the pressure described by Professor Caiden? Do you have any advice if we are looking at potential

candidates? How serious is that problem? Should we be looking for a retired judge, a retired professional or someone about to be retired, so that he does not feel threatened by the office or by the bureaucracy?

Dr. Hill: It is such an individualistic thing. I know one thing from my experience here and from my experience with the Ontario Human Rights Commission, and that is that a person who assumes this position must know, through experience, the Ontario community. You do not get that in three, four or five years. You must know the battery of voluntary and governmental organizations and you must have some level of contact. I think otherwise you can take a much younger person—I am not thinking about chronological age so much—a person who does not have that kind of experience and it takes him five or 10 years to learn the community well enough in order to get around it, to deal with labour, to deal with business, to deal with government, to deal with religious institutions and to deal with the myriad of ethnocultural organizations. You cannot get that in your 20s and 30s, I am sorry to say. It does take that type of experience.

I would opt for the latter description you gave, the person who is a more senior person—and you can be a senior person in your 40s and 50s—who's been around a bit and who has known the community and who is secure and does not have to worry about building a career ladder, if you must, who has a measure of independence and can say: "Listen, government, you can do what you want. I'm secure, I'm going to take this position and that is that."

A person who has not built that base in his employment history yet may be less prone to take the kind of action that I think has to be taken. I do not know if that answers your question, but I do think it ought to.

Mr. Philip: It think it does and it leads to one supplementary. I gather that you feel that the experience in the community, and you mean the province, is terribly important.

Dr. Hill: Exactly.

Mr. Philip: Therefore, you would not be too sympathetic towards an Ombudsman being appointed who may be very experienced, very knowledgeable, even in the field of ombudsmen, but who would come from another province, because he would not have those—

Dr. Hill: I must say very honestly, I think it would work an enormous handicap in terms of this province, a province of nearly 10 million people. As complex and sophisticated as this

province is, they must, in my view, know this province. I brought with me that kind of experience level, which helped me immeasurably in dealing with many of the problems I had with government inside and outside. They have to learn. It will take them 10 years to learn the province in order to handle some of the problems.

Mr. Philip: The counterargument to that is that the person who comes from another province and who is experienced in a different, but similar bureaucracy does not have the old boys or the connections that may prejudice his decision. He does not think that John Smith, who is a deputy minister and whom he thinks was a great deputy minister, would probably make a good decision whereas Sammy Jones is a real jerk, from his personal experience as a fellow civil servant or dealing with the bureaucracy, and therefore approaches him with a prejudice.

Dr. Hill: I can understand that and appreciate that argument, but on balance I would go for the other way.

Mr. Carrothers: I wonder if we could focus back on the estimates for a minute. If I have understood correctly, Mr. Hill, the estimates here would show a 1.92 per cent increase above what one might consider cost of living. I am wondering if we might find out where those increases are taking place and what extra services are being provided by that increase.

Mr. Mills: The cost-of-living increase is just in salaries and benefits. Benefits escalate almost in lockstep with salaries.

Mr. Carrothers: No; I meant the 1.92 per cent that this 1989-90 is over the 1988-89, which I gather is on top of what might be cost of living. I am assuming that it then provides an enhancement to some services or cost. I just wondered where that is—it is not quite evident to me in what you have given us—and I am wondering if you might highlight what services this will provide above what you are doing now, or perhaps in what areas those cost increases are occurring.

Mr. Mills: Yes, sure. Starting on page 4, you get some idea of the items starting at the heading Transportation and Communication. There is a chronicle of items on pages 4 and 5. You will notice that many of them, particularly those on page 5 where we set out the services, and page 5 item (d) where we set out supplies and equipment, are one-time expenditures.

Mr. Carrothers: Yes.

Mr. Mills: By way of illustration, I would cite the cost of purchasing a car that is due for

replacement. That is not a recurring item. Some of the items—Like item (d)(5), decreased costs for purchases of computer software: that was a one-time expenditure last year that we are taking out this year.

Mr. Carrothers: Yes.

Mr. Mills: The narrative gives a pretty good idea of where the 1.92 per cent is being requested.

Mr. Carrothers: I guess it had not been completely clear to me. I was just wondering: is it salaries that would be taking the main—

Mrs. Meslin: Mr. Carrothers, I think what we are trying to show the committee is that the total on page 5, the \$140,500 that is there, represents the 1.92 per cent. That is everything we are asking for, over and above the regular—

Mr. Carrothers: So most of it is in salaries, the telephone lines and communications?

Mrs. Meslin: That is true.

Mr. Carrothers: You are not adding staff, I guess, are you?

Mrs. Meslin: No, we are not asking for any staff additions.

Mr. Carrothers: It was just a raise.

Mrs. Meslin: No. Even that is not there, because the cost-of-living increases do not show in this. We have to go to the board and we will then put it in the estimates. Last year's cost-of-living approval from the board was put in this year. This year's will not go in until next year.

Mr. Carrothers: That increase you just spoke of is not in the 1.92 per cent, is it? This is over and above that?

Mrs. Meslin: That is right.

Mr. Carrothers: I see almost a \$70,000 item on performance increases. I suppose those are merit increases or whatever, going to your staff.

Mrs. Meslin: Yes.

Mr. Carrothers: That is almost half of this \$140,000, I guess, and the rest of it, the other big items, are the toll-free phone calls. This will be a new service, which is costing more to run than the one existing?

Mrs. Meslin: We have a toll-free line, but the one line was not sufficient. We were so overburdened that we had to add a couple of lines; but in addition we have added a French line because we think it is important, considering the number of calls we have with people whose first language is French.

Mr. Carrothers: In essence, there will be four lines if this budget is approved, compared to the one that is currently there?

Mrs. Meslin: That is correct.

Mr. Carrothers: What I wondered, in looking at this was, since you are not adding staff, where would the service increase from your office be coming from, based on this? I guess you are going to be getting more out of your staff than you did before.

Mrs. Meslin: When Dr. Hill arrived as Ombudsman, he made us understand very clearly that we needed to utilize the staff on a broad spectrum; to use the same people and give them more diverse duties.

Mr. Carrothers: You are hoping—because I noticed that there were purchases of various types of automated equipment—that there would be more productivity out of the office in the coming year to warrant those.

Mrs. Meslin: We have introduced computerization on a very gradual basis, unlike some of the other agencies. We did not just go out and order computers for everybody. We started off with just three and we are adding incrementally. As we do, we are buying the support services, software, etc., for it so that within the next, I would say, two to three years, we will be completely computerized, but we feel it is not an expenditure we should jump into quickly.

1040

Mr. Carrothers: It seems fairly wise given the range of equipment out there. But you do feel confident that there will be more service to the public, based on this increase?

Mrs. Meslin: Definitely so.

Mr. Carrothers: Because that leads me into another question: What do you do to promote the office? I am not quite clear. I have heard ads from time to time on the radio—clips, I think of you, Dr. Hill.

Dr. Hill: Right.

Mr. Carrothers: And I am wondering what your office does. You are now going to expand the toll-free numbers, which makes access much easier, but what are you doing and what expenditures are you making to promote the office or make it more known to the public?

Dr. Hill: One of the things is the regionalization of the Ombudsman's office—the setting up of nine different offices across the province, seven of which I think I established, to get the office more accessible and regionalized in this mammoth province—and we have done that—and asking in all those regional offices for the workers to get out into the field, to speak and to represent themselves in the community, and to

put ads in papers about the office being available; not propagandizing the office but letting people know what exists. That is one thing.

The other thing is the whole area of public speaking, conferences, meetings and sending representatives to innumerable functions. What was it last year—do you have the number?

Mrs. Meslin: I think it was over 200.

Dr. Hill: Over 200. I think we have given close to a thousand speeches and representations since I have been Ombudsman. So we are going out to the public, making them know that we are here and then in turn, making the office in Toronto more accessible to public use so people can use our facilities without cost. Community groups are permitted to come into our facility—except that if they want coffee and refreshments, they have to furnish their own. But they are able to use our rooms, our offices and the boardroom.

That is another way we are making ourselves known; but also by representation at conferences, meetings, seminars, the whole spectrum—TV, brochures—we have built up a fairly good public education program and without its being mandated in our legislation. I just stole from Peter to pay Paul, because we do not have permission explicitly to promote an educational program, as you have in the Ontario Human Rights Code, where you are mandated by law to form and produce an educational program. We do not have that, but I felt it was so necessary I did it anyhow, and I just took it out of another part of my budget.

Mr. Carrothers: I see. So it would seem that the main way you are trying to do that is by making your offices more visible and by speaking; which means, I suppose, if there is a cost it is coming out of staff time available for other things.

You mentioned television, but you are not spending a great deal. There is no item in this budget that mentions advertising.

Dr. Hill: No, no—free television.

Mr. Carrothers: Free television, I see.

Dr. Hill: That is right. We have used MTV about five times in the last year and a half, and public service announcements. We are invited to be on a lot of TV programs, but we will not pay for TV time. It is too costly for a little office like ours.

Mr. Carrothers: That would explain why I hear your clips at 1:30 in the morning, then.

Dr. Hill: True, true.

Mr. Carrothers: I am relatively new to this and you mentioned the regional offices. You

have probably told this committee before, but for my benefit, what sort of staff would be in a typical office? Would it be a storefront, for instance, like the proposed Sudbury one? Would it be two or three staff members, or is it larger?

Dr. Hill: Two at the most.

Mrs. Meslin: Generally we have storefront offices. We have tried to establish them with one person to begin with. We started by having only one person part-time, working out of his home, then we found it very difficult for him to interview people. We could not ask him to interview people in his home. As the workload increased, we realized that it would be far better, to open small storefront offices. We still have three offices that have two people. The Ottawa office, for instance, has a very large organization attached to it. The Thunder Bay office and the Kenora office for the far north have two people. They have an investigative, outreach person and a secretarial, intake person in those offices.

As a matter of fact, we are now doing another study of those offices to see whether we still need two people in each of them. As we said before, the process is to try to tighten it up, provide good service, but not expand. It is so easy to do, that before you know it you have large bureaucratic organizations that are just costing money, and I do not think that is useful.

Mr. Carrothers: So what would really happen is that the regional office becomes the first point of contact. They may speak to the individual, but the file ends up being referred back to your central office if there is a great deal of work that needs to be done on it.

Dr. Hill: Especially since we do not have lawyers out there.

Mrs. Meslin: But they also have to be the contact people. It is no good, especially in the north, if northern people come into our office and then feel that somewhere down in Toronto some faceless bureaucrat is handling their case. We have to keep the link with those people. While that complex investigation is carried out, that investigator has to keep a link with the regional office and report on what is happening.

Mr. Carrothers: Do you have a fairly elaborate communications system between your regional offices and the central office?

Mrs. Meslin: Well, we have a telephone.

Mr. Carrothers: No fax machines or what-not, I guess?

Mrs. Meslin: We have not put fax machines in all the offices yet because we are still trying to see

how costly they will be. I hope that is for the future, though.

Mr. Carrothers: One other question I have, and it just occurred to me as I went through this, is about the native liaison program. It seems that the main impetus of it is the provincial program officers here in Toronto, which I guess—

Mrs. Meslin: There are two, one in Toronto and one in Timmins.

Mr. Carrothers: I just wondered at the Toronto position. Looking at it simplistically—

Dr. Hill: He goes everywhere. He floats all over the place.

Mr. Carrothers: He is only notionally in Toronto.

Dr. Hill: He is more out of Toronto than in Toronto, but we need him in Toronto so I can talk to him.

Mr. Carrothers: Once a month sort of thing. Thank you. I do not have any further questions.

Mr. Cousens: One of the things that came through from Mr. Carrothers's questioning touched on the French services and your special line for French. I get worried at how much it is costing for all the French services. What would be the increase in the provision of French services in the last several years for your operation and what would be the ratio of French requirements of the people who are calling, as opposed to other languages? How much French is being asked for, as opposed to Italian, Chinese or other important languages that we have in the province of Ontario?

Mrs. Meslin: First of all, as I am sure you are aware, the government has encouraged organizations to institute policy where they will have designated staff positions to provide service in French in certain areas. The government has not extended that particularly, although in our office we speak almost 20 languages. We do attempt to speak to anyone whose language is other than English in his language if we can.

In terms of the French program, we have kept up with and made proposals to the French-language committee of the government about its expectations and tried to keep ourselves in line. We do have quite a number of people now who do call and write to us in French. So we are able to respond.

Last year, we did ask for a budget increase to handle this French-language service, because it just becomes phenomenal. Part of the problem we are faced with, of course, is that when the government says we must have a French-language program, we have to train the people in

the office or buy outsiders who can speak French fluently. We have a number of people in the office whose French was good but needed updating, and all of that costs money. Up until last year, we used our own budget funds, but with the large program that has been encouraged, we have had to ask for some budget increases.

1050

Dr. Hill: We get letters, I would say regularly, coming to us in French that we have to answer in French. We have staff to do that. I cannot tell you how many a day would have crossed my desk, but every week letters come in in French. I think the francophone population is half a million or more in the province, so we do get regular correspondence from all offices, except maybe Kenora, but in just about all the other offices we get regular inquiries in French from people requesting services.

Mr. Cousens: My question—and I appreciate the answer is coming through—but for the rate of increase of services, do you have an estimate of what the increase in cost for the French services has been over the last three or four years? Have you tracked it? Can you identify, just as the second part to that, the number of requests for service that come in exclusively en français?

Mrs. Meslin: We would have to get you the exact figures, but the costs have increased because of the government's request that we supply these services.

Mr. Cousens: I know that, but I am asking for the figures on it. I guess maybe, Madam Chairman, the—

Dr. Hill: We have some things here.

Mrs. Meslin: Do you want to answer it? You have the figures.

Mr. Cousens: See, that is the smart answer; get someone else.

Mr. Mills: Last fiscal year we budgeted about \$182,000 and we estimate that the annualized cost of these services is \$169,000, which is about 2.3 per cent of what we are asking for today.

Mr. Cousens: How much is that up over two or three years ago?

Mr. Mills: We provided the services but we did not attempt to cost them.

Mr. Cousens: I suppose that is something that is right throughout the government. Now that we have French identified with Bill 8, we are able to say, "Okay, this money was previously hidden and now we are able to identify it in areas that were not previously identified."

Mr. Mills: In point of fact, we were asked to identify it.

Mr. Cousens: I guess that is something we should get the auditor to do, but that is another question as to how much is really being spent on that.

Dr. Hill: We get quite a few in Italian, . You had asked a question about Italian.

Mr. Cousens: Yes, that was the second part of my question.

Dr. Hill: Again, we do not have costs but we have a number of our staff who are kept thoroughly busy answering inquiries in Italian—in a variety of languages.

Mrs. Meslin: And Portuguese.

Dr. Hill: Portuguese and Italian—very much so.

Mrs. Meslin: We now have an increasing number of people requesting Vietnamese and Chinese.

Mr. Cousens: I think this came out of something that Mr. Carrothers said. I think that his line of questioning had a great deal of merit.

One of the things that I have in my riding—and I do not know if others do; Linda might have the same thing—I have 50 different languages being spoken in one elementary school. That means the parents, in many cases, have no understanding of English and we therefore have an extra responsibility, not just to be looking after our French constituency, which is important, but also making sure that those who have a need of your services can access them and know that they can do it.

Dr. Hill: They can if they want to.

Mr. Cousens: I know they can, but I think that ties into—

Mrs. Meslin: Mr. Cousens, there is an added problem that your questioning focuses on that has come to our attention more and more, and that is that although we have people on staff who speak Italian and Portuguese, we are now faced with a problem where people come in and say, "Not only do I want someone to talk to me, but I want all of the correspondence, I want all of your investigative correspondence, in my language." Just looking at the expense is absolutely horrific, and yet you feel a real need to try to do something.

We are struggling with the dilemma right now. What we attempt to do is outline their problem to them in a letter in their language and then ask them if they can find someone we can deal with from then on who speaks English, because of the

complexity of an investigation. Then the final report, if we support them, goes back to them in English and in their language. But the costs, which we do not ask for in terms of funding, are horrendous.

Mr. Cousens: I know this goes beyond estimates, but estimates open up some good subjects for all of us to work with. I would appreciate getting a copy of all your public relations literature that you have, and maybe other members of the committee would appreciate it, so that we can see what languages you are dealing in. I know I could use some of that in my own local newsletter, so that maybe we have three or four different items saying: "There is the Ombudsman. This is his number." We could do it in Chinese and Indian and Sanskrit or whatever else.

People have to know about your service and that it is available, and you are their defender. If they do not know it—which ones are you missing, because they just do not know any better?

Mrs. Meslin: We have also made any of our literature available in braille.

Dr. Hill: While we are speaking about this, let me get back to another problem. This is all part of our educational program, but we have no educational budget. This is the problem I have. I have repeatedly asked for an amendment to include education and publications within the mandate of the Ombudsman, and that the Ombudsman must indeed report on what he is doing in education, as they have to do within the Ontario Human Rights Commission. I have yet to receive that amendment. I have asked for it for five years.

When I do the things that you mention, I am doing them by moving money from one part of my budget to another. It is a very serious problem, and it is one I am very saddened that I have not been able to rectify during the period that I have been Ombudsman.

Mr. Cousens: Madam Chairman, is that something that we could add as a recommendation in our annual report or in some other area, that there be some consideration of that?

Madam Chairman: I think it is in there. These are part of the amendments that you have requested from the Attorney General (Mr. Scott). We have said that we would like to see the amendments introduced and an opportunity to review them in this committee. The report which we will be tabling hopefully within the next week or later this month will reaffirm Dr. Hill's request.

Mr. Pollock: As you know, I am relatively new to the standing committee on the Ombudsman. I have not been on this particular committee since 1984, but I want to put it on the record that I think Dr. Hill has done an outstanding job of being Ombudsman for Ontario. I would like to pay tribute to not only you, Dr. Hill, but also your staff, for your efforts on behalf of the residents of Ontario.

This is in no way to take away from some of the problems that some of the first ombudsmen had. The office itself is relatively new to the province, because it was started, to the best of my knowledge, in 1976 by Arthur Maloney. Of course, for him to put everything in the right perspective right from the start was a really tough job to do without making any mistakes. Certainly, as far as I am concerned, he did a terrific job; certainly a far better job of putting the Office of the Ombudsman together and getting everything slotted in than Brian Peckford has been doing in growing cucumbers.

That brings me to this statement that is in the estimates. The view is that "there has been no adverse criticism of this office from the Provincial Auditor. I believe that I am leaving the office in excellent shape."

You did not, by any chance, feel that you did not get the office in reasonably good shape, did you? Do you want to comment on that?

Dr. Hill: I do not want to say anything to detract from the work of my predecessors. However, I would just make the comment that, before my tenure, we were severely criticized by the Provincial Auditor, publicly and openly, and we sustained a tremendous amount of criticism in the Legislature in terms of our financial situation before my time. That is as much as I would like to say.

Mr. Pollock: Bearing in mind the fact that the whole thing was relatively new, that is almost bound to happen. When something is new, you cannot possibly slot everything in and take off without any wrinkles and not run into a few of those problems. I just wondered how severe—

Dr. Hill: We had problems financially before my tenure. I would just like to say that this sort of thing with a new agency takes time to iron out. I thought that within my time I had a chance to iron some of those problems out.

1100

Mr. Pollock: I take it when the auditor was involved that there was money spent on projects that should not have been spent on certain

projects. As I say, I do not recall all the situations.

Dr. Hill: I would prefer not to go over this, but it is all on the record, it is in Hansard.

Madam Chairman: I just wanted to make the comment, Mr. Pollock, that you are one of the longest-standing members on this committee. You should consider yourself one of the experts now, rather than just referring to yourself as merely a member.

Mrs. LeBourdais: I do count myself as one of the rookies on this committee, having just come on board very recently.

Actually, Mr. Cousens has explored one of the main French-language areas that I had wished to explore. Do I assume that the publications that you have informing the public about your services are fully bilingual?

Mrs. Meslin: Yes, they are.

Mrs. LeBourdais: Aside from the requests for the use of the French language by the people who are in touch with you, how many people, if you could just maybe give me a guideline, call up because their complaint is, perhaps, the lack of availability of sufficient French-language services in various parts of the province—that being their complaint first and foremost, before a difficulty in a specific area?

Mrs. Meslin: I think that when we began five years ago, there were a lot more. They have lessened because we find that the population is beginning to realize that governmental agencies are expected to give this service. So we get some, but not a great many.

Mrs. LeBourdais: Are you seeing a demand in any specific areas by the francophone community in dealing with problems in a given area? Does it come up in that way?

Mrs. Meslin: No, it is just general.

Mrs. LeBourdais: Is it my understanding that the Sudbury office has already opened, or will it open in 1989?

Mrs. Meslin: It will open. We have just hired the individual who is now being trained. We hope to open the office February 1.

Mrs. LeBourdais: Could you give me the justification as to why, specifically, Sudbury was selected?

Mrs. Meslin: We did an overall feasibility study to determine the needs in the north. Our other offices, like Sault Ste. Marie, were becoming inundated with Sudbury complaints, plus the fact that the feasibility study showed the need there very clearly.

Mrs. LeBourdais: Just by way of conclusion, if I might continue on with Mr. Pollock's comments with regard to your tenure here, Dr. Hill. It seems to me that you have a son who is a musician. I think particularly in last week's session you made a specific appeal for an individual, one person. To quote some of the lyrics from your son's work, "Can't we try just a little bit harder?" I think that was very much coming through.

Certainly, on a personal basis, it made me feel that perhaps that kind of feeling went from father to son, to try just a little bit harder. I would thank you for your efforts in that area.

Dr. Hill: Thank you very much.

Mr. Bossy: Just very briefly, dealing with the salaries, am I to read into this that there is generally an average now, in the last three years, of about \$60,000-plus of increments, plus the cost of living. Is that what the increases in pay would be?

I am trying to read this where it says in 1989-90 it is \$69,400 for increments. In 1987-88 it was \$59,300 and in 1988-89, \$63,900. "Therefore," it says, "the increase to the salary base is \$4,600." That is an annual average?

Mrs. Meslin: Yes.

Mr. Bossy: To all classified employees?

Mrs. Meslin: That is right.

Mr. Bossy: If you multiply 123 classified staff times \$4,600—am I going the wrong way here in calculations? That does not seem to add up.

Mr. Mills: Some of our employees have reached their salary maximum, so not every employee is entitled to a merit increase. I think that is the answer. Not everyone receives one of these increases.

Mr. Bossy: It does say that there was a net saving because of resignations, then positions filled with people at a lower salary. So the amount of money that was saved in that area—I am trying to reconcile the difference here of \$7,500, which seems to be minimal. It just happened that those people who resigned were close to the lower salary, because there does not seem to be much saving there. Or are we talking about one or two?

Mr. Mills: This is very much a net figure. If we calculated the savings that resulted from the resignation of every employee who was at or near the maximum and then added to it the salaries that we pay to people whom we hire—some of them are hired at the minimum and some are hired slightly above the minimum, depending on the situation. For instance, internal promotion

can result in someone being hired at more than the minimum of the salary range, so this is very much a net figure and should be seen in that light.

Mr. Bossy: We also have to assume that the Board of Internal Economy would have approved roughly a 4.7 per cent cost-of-living increase.

Mr. Mills: We follow the public service salary scales and the board understands that. Each year when we present our estimates, we present a request for an order in council which reflects increases at the rates of increase that are approved in the public service.

Mr. Bossy: What would be the percentage of increment increase of salaries?

Mr. Mills: The cost-of-living increase that was approved averaged 4.6 per cent. It varied according to classification. Then on top of that, depending on where a person is in the salary range, he is entitled to a further increment for performance. I think five per cent is a fair average.

Mr. Bossy: Overall.

Mr. Mills: Yes.

Dr. Hill: But we keep rigidly within the public service guidelines.

Mr. Bossy: Another question concerning the services: I am looking at the increased cost of maintenance contracts, at \$39,700. That is the increased cost. We see all these savings, the decreased costs because of installation, computer equipment, rental. We see an awful lot of savings in here. We get a net increase of only \$7,800, but there is plugged in here \$39,700 for maintenance costs and also a \$29,000 increase. Would this be for two spaces? Is that for the rental of two areas in London and Sault Ste. Marie?

Mr. Mills: Yes.

Mr. Bossy: Or the North Bay and Sudbury offices. Is that the increase? Because the others are, in effect, already in the budget.

Mr. Mills: In this current fiscal year, we have rented space in London and Sault Ste. Marie. We propose in the coming year that begins April 1 to rent space in North Bay and Sudbury. Clearly, if Sudbury opens February 1, as Mrs. Meslin has said, we will have to enter into a lease on or before that date.

Mr. Bossy: Going back to the computer installations, the computer installations have been such an increase within the last year that the contracts for servicing this computer then, this \$39,700, is directly related to the increased installation. There must have been a big move to install.

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Mr. Mills: I should explain that we lease the mainframe. One of the terms of the lease is that we take out a maintenance contract with Wang Canada. We also own equipment which we judge not to be subject to technical obsolescence. That also has to be covered by maintenance agreements.

Mrs. Meslin: Mr. Bossy, you indicated that it looked like it was a big installation. We made a decision about a couple of years ago. We used to lease equipment, but when we did a study of the costs over time, we realized that if we bought it, especially equipment that is not going to be obsolete in the next month or year, we would save ourselves a great deal of money. We have slowly done that, so sometimes you are seeing the turnover from a lease contract to a purchase. That is where you see some of these savings from the rental arrangement.

Madam Chairman: I want to go back to the Sudbury office. I noticed that no new staff are being added. Are you replacing someone from somewhere else to accommodate that staff accompaniment?

Mrs. Meslin: Yes, we watch our vacancy rate very carefully. When it comes to establishing field offices, we try to take a vacancy from somewhere else where we think we can, and apply it to a new office. We have been quite successful in compressing staff in that way.

Madam Chairman: Do you intend, on starting there with the one person?

Mrs. Meslin: Yes.

Madam Chairman: Does that person you have hired come from the Sudbury area?

Mrs. Meslin: Definitely. Our philosophy has always been to hire people from the region.

Madam Chairman: Just refresh my memory. It was the North Bay office that you had considered closing at some time about two years ago?

Mrs. Meslin: We had closed it and then the committee debated the matter and we opened it on a part-time basis. The woman who is there now is going to become full-time.

Madam Chairman: There is enough demand to make it full-time then?

Mrs. Meslin: Well, we expanded her territory in order to do that. There was not as heavy a workload as in, for instance, Sault Ste. Marie, but by expanding her territory slightly there has been enough work for her now to be full-time.

Madam Chairman: Is she in a storefront, or is she a field worker still in her home?

Mrs. Meslin: No, she is still in her home, but we are hoping to be able to move her into a storefront within the next year.

Madam Chairman: I was not quite sure. Mr. Cousens at some point seemed concerned about the language situation—and I do know that you have a great number of people on your staff who speak a variety of languages. Did you have the opportunity to say exactly how many languages are spoken.

Mrs. Meslin: Yes, I think I mentioned 22.

Madam Chairman: I want to do that again, because I do know that we have someone who has come before us who speaks Croatian. I know that there are dialects and that you have had difficulty corresponding or at least responding to them, as we have. I know you cannot possibly service every language out there in Ontario but 22 is an admirable effort. I think that has increased substantially; I am not sure how substantially. You did not have that many languages, say, two or three years ago.

Mrs. Meslin: It ebbs and flows with the staffing in the office. When people apply for jobs, we ask if they have another language, but it is not a prerequisite unless it is a designated French position and then that is quite a different story. We may well lose our Vietnamese person who moves to another ministry and we do not get him or her replaced, but someone else will come along and speak Hindi. It ebbs and flows.

Madam Chairman: I noticed when I had a tour of your offices that most people seemed very happy working there. Because of the sensitivity of the problems that they are dealing with, do you have a burnout rate of the people working with you? Is there a very high turnover in staffing of investigators and people who do work with you, or would you consider it average?

Dr. Hill: We get raided frequently. People are always offering them jobs. After we get someone going and things are developing beautifully—we have them trained and experienced—bam, someone comes and offers them 25 per cent more in salary and they are gone. This happens all the time.

Madam Chairman: It sounds like our staff.

Mr. Bossy: So what's new?

Mrs. Meslin: One of the interesting things we have at the Ombudsman's office that you do not have in another ministry is that our investigators have a great deal of interrelationship with various

ministries, so they become well known in particular ministries and most job opportunities are available to them. There is also a burnout rate to a certain extent, and we have been trying to develop staff training programs to assist them in coping with some of the stress of the job.

People who attempt to join our investigative staff are generally young people either just starting their careers or very close to the beginning of their careers. They are not people who decide they are going to be investigators for the rest of their lives. They come on at about 22 or 23 years of age, so after about five or six years they have had it, and so should they. Because we are a small office, the career opportunities are not there for advancement within the office, so they begin to look elsewhere for career opportunities. But I am convinced it does not have anything to do with the working atmosphere per se.

Madam Chairman: I agree that most people seem very, very happy and pleased to be there, but I do know that with our staff, and particularly our constituency staff, there is a great deal of pressure on them and quite often they take the problems that are brought forward to them home with them personally. I find that there is only a certain time one can deal with this, because they really do see all the problems that are going on, and only them, and sometimes are rarely thanked for their job.

I see the highlight that there has been no adverse criticism of your office from the Provincial Auditor. As a member of the public accounts committee, I am prompted to ask whether they have looked into your accounts in depth, because I have had an opportunity to look at the last two reports. I wonder to what extent they looked at your operation in the last five years.

Dr. Hill: Every year they go through it with a fine-tooth comb. Do you want to speak to that, Allan?

Mr. Mills: Just to say that the legislation says that our accounts will be audited annually by the Provincial Auditor and he does that. This past year, I have to say, it was not as comprehensive as in other years. I take that as a compliment, however.

Madam Chairman: I do know they can be very thorough, and I know if Mr. Philip were here he would chime in as chairman of the public accounts committee that the Provincial Auditor leaves no stone unturned.

Dr. Hill: They bring in a team of investigators and they look at it for a number of days, and this

happened every year. We would come out clean every time.

Madam Chairman: That is great. We hope that we do not see you in front of us in that committee as well.

Mr. Cleary: Madam Chairman, being a substitute in the committee, I have a question that does not really deal with the estimates, but I have another question for the Ombudsman, with your permission.

Madam Chairman: As long as it is on a specific case, I think it would be acceptable to the committee.

Mr. Cleary: We in our part of eastern Ontario have had considerable good luck, I might say, with your Ottawa office. I guess that my question to you would be, how many years do your active cases go back? I understand you have some still back in the 1970s?

Dr. Hill: No, no. If I had some back in the 1970s, I think a few people would get canned.

Mr. Cleary: There are none that were in the 1970s?

Dr. Hill: I would stand corrected by my executive director, but I hope there are no cases going back to the 1970s.

Mrs. Meslin: There may be cases, for instance, a case that involves a court proceeding would have to be set aside by us. For instance, one of the cases we dealt with last year before this committee took eight years, and the reason that it took eight years was that I think it was six of those years it was involved in litigation and we were not permitted to become involved until all of the litigation was complete. On those issues, if we look back, we may well say we may have a case from the 1970s, but it would be because we cannot work on it for some reason and it is in limbo.

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When we get that situation the complainant or complainants are made fully aware of what is happening and why we are not working on the case. Otherwise, when I did a file review two weeks ago with all the assistant directors, we did not have active cases older than 1986. There would have to be a reason for an inactive case.

Mr. Cleary: I am glad I have been able to get that information.

Madam Chairman: I wanted an opportunity for you to clarify something on the record. I think Mr. Cousens asked the question, how many cases do you have that have been in existence for over a year? You replied 500 and some odd, but

you said one case is 354 people. I wonder if you want to clarify that, because that is quite an item, which I gather would perhaps skew the statistics because of some other circumstances. I wonder if you want an opportunity to explain that, given Mr. Cleary's question.

Mrs. Meslin: The difficulty with cases that have many complainants is that, not only is it possible that the particular issue is sort of a generic issue that we are looking into, but each has some individual aspect to it. The best example is the case we had last year with the trust company where, although the issue was whether the government regulated correctly or what have you, we had to examine each of those people individually and what had happened to him in his experience with this particular trust company. That tends to delay a case, because even though we have 300, we cannot just say it is only one case. It is one case with many complainants. That tends to extend the time we are involved.

Mr. MacDonald: I would like to ask Dr. Hill and his people, if I can word this question properly, what is the main percentage of cases that you deal with over the year? Is there a certain type of case that you deal with more than another? What does it pertain to?

Dr. Hill: The Ministry of Correctional Services would be a high proportion of the cases, with the jails being one of the highest, I guess. It used to be workers' compensation, but I do not think it is any longer. Correctional institutions would be one of our larger case loads, if not the largest.

Mr. Bossy: This is slightly off the estimates, but I would like to ask the question because we likely will not have an opportunity to ask any more questions of Dr. Hill. It has been most gratifying and a great experience to have served on this committee ever since my arrival here back in 1985. Dealing with yourself has been a real good experience, at the same time since we have had good service from the Ombudsman's office. I want to say that.

But something happened here a week ago that I had not experienced and, if I may ask this question of you: How often have you ever come back to the committee to ask, in an appeal situation, when the report was ready to come down and our recommendations were ready for approval, to appeal to the committee to change its mind on a recommendation? How often have you had to do so during your tenure?

Dr. Hill: Only that one time, because I felt I was morally obligated to do so, considering the circumstances of that particular woman.

Mr. Bossy: So it was a precedent-setting case that we dealt with. I have felt very uncomfortable ever since that and I wanted to ask you that question.

Dr. Hill: I wrestled with that for a number of days, but then I kept thinking about that complaint. I had to come back to it.

Madam Chairman: Following on that, though Dr. Hill, did you feel that perhaps what you perceived as the committee's decision after hearing the case in the summer, and that which you saw as the recommendation that then came in the report as you understood it, were not one and the same? That the committee had, somewhere along the way, changed its recommendation, or not reflected the hearings as you understood them in August? Is that why you came back? Were you asking the committee to change its mind or were you asking it to reflect once more on the recommendations and decisions that it made in August, after hearing the case for a full day?

Dr. Hill: We agreed with the original decision, but we were asking the committee to reflect once more.

Madam Chairman: That is how I understood it as well.

Mr. Charlton: Maybe just for a few minutes we can go back to the comments that were made earlier about your request for, and concern about, lack of action on an educational component. Could you tell us a little more about what you have in mind in terms of an educational component.

Dr. Hill: Yes, I will. I mentioned five years ago, when I first became Ombudsman, and I have to keep stressing that I feel the Ombudsman should have the same obligation to report to the public his educational efforts, and do work in that field, as the Ontario Human Rights Commission does. I think that should be mandated in law and a budget set aside for that.

I think that ombudsmen should sponsor lectures, conferences, meetings and seminars. I think they should write educational articles and perform educational and community programs regionally with volunteer groups and other governmental groups. The whole ambit of public education that is worked out well by other agencies of government should also be available to the Ombudsman's office.

Take the working position that I do: that the Ombudsman's services are, indeed, human rights services. The things that we are trying to do involve social justice. If people do not know their rights, how can they protect them? If you do

not have the educational materials out there, how can you ever perform the service properly?

That is what I meant by an educational program. We have never, ever had a budget to do that. We have never had a mandate to do it. In fact, to be very frank, I am doing illegal things. To be very honest, to be very candid, I am just asking the government to make it legal, and I have been asking them to do that for five years.

I can spell out definitively all kinds of educational things we should do beyond and above what I am saying: television, radio, things of this nature, without propaganda, but spelling out and telling the public what exists in Ojibwa, in Cree, in Croatian, in Italian, in German, in French and so on, so that it will know that we are here to do business. That is what I mean by an educational effort.

Mr. Charlton: Flowing out of that: what I think you are saying is that the public not only needs to be educated about what its rights are and what services exist, but also needs to be educated about how to deal with government and with particular government programs. Do you have any sense at all—and I do not mean in the way of accurate numbers—of the ability, through education, to reduce the rate at which the public and government end up at odds?

For example, you mentioned earlier—I think in response to Mr. MacDonald—that workers' compensation cases used to be a large component of the complaints that you received in your office. Every year in this committee's report to the Legislature those formed a large number of the cases that we were recommending support of. Because of the kind of work you do, where you identify a particular area where conflict is continually occurring between an agency like the Workers' Compensation Board and claimants of the WCB, to what extent, through education, could some of that conflict ultimately be avoided altogether? Do you have any sense of recurring patterns that you find in the kinds of complaints you get?

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Mrs. Meslin: I think one of our very positive experiences has been in our regional outreach or public relations efforts in relation to WCB, because a lot of people out there did not realize that a new tribunal had been established that they could go to. It was through the efforts, in many cases, of our staff going to meetings of various groups that had WCB problems, where we could direct them to this new agency, which meant that in terms of the relationship with WCB things began to be a little better. People saw something

happening. It was a positive thing for the new tribunal and it was a positive thing for us, because we were not constantly getting cases that should not have come to us. That type of thing helps.

Also, what we would like to attempt to do more of is speak to groups that have relationships with governmental agencies. For instance, we have a very large corrections component. There are many groups out there that do not understand what we do in relation to corrections. We have difficulty, because of the staffing and the budgeting, making that known to them; going into the institutions, for instance, and letting them know what their rights are in relation to corrections.

We have one native worker in Toronto and one in Timmins. One of the things we have attempted to do, and they just cannot possibly do it, is speak to the native groups within the correctional institutions to let them know about the Ombudsman and to understand what their rights are. This would help correctional authorities because of the difficulty they may be having with some of the native people who have no idea where they can go.

Mr. MacDonald: I hate to come back to this question, but I guess I missed it when it was first talked about. I think Mr. Carrothers, or maybe Mr. Bossy, brought it up. When you open a new office—as I guess you are opening a new one in Sudbury—it is staffed by two people, is that right?

Mrs. Meslin: By one.

Mr. MacDonald: What is the basic salary that person receives?

Mrs. Meslin: Roughly between \$25,000 and \$30,000, depending on experience, etc.

Madam Chairman: Any further questions from the committee to the Ombudsman on the estimates?

We have a motion. Can somebody move the motion to accept the Ombudsman's estimates and report them to the Legislature? Mr. Bossy?

Mr. Bossy: "And report them to the Legislature"—those are the best words you know.

Madam Chairman: I am depending on the clerk for the proper format. Is everyone in favour of that?

Motion agreed to.

Madam Chairman: Since we have concluded our business, I would like to thank you for coming before us on estimates. You have always been complete and thorough. I hope that the next Ombudsman will not think that you have been too frugal and find it too difficult to live within the bounds that you have set, but we do appreciate your coming every year with very little increase in your budget.

Dr. Hill: I would like to thank you, Madam Chairman, and the committee for the understanding and the co-operative way that you have handled the budgets and the perceptive questions you have asked. I appreciate it very much and I am, in a way, sad that this is my last budget with you. The only budget henceforth will be my budget at home.

Madam Chairman: You probably have more difficulty with that one than with this one, as I am sure all of us do. Thank you very much.

We are adjourned until next Wednesday, when we will be in camera discussing the expanded jurisdiction of the Ombudsman's office.

The committee adjourned at 11:35 a.m.

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STANDING COMMITTEE ON THE OMBUDSMAN

- Chairman:** Nicholas, Cindy (Scarborough Centre L)
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Carrothers, Douglas A. (Oakville South L)
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Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitution:
Cleary, John C. (Cornwall L) for Mr. Henderson
Clerk: Carrozza, Franco

Staff:
Wilson, Jennifer, Research Officer, Legislative Research Service

Witnesses:
From the Office of the Ombudsman:
Hill, Dr. Daniel G., Ombudsman
Meslin, Eleanor, Executive Director
Mills, Allan, Controller

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